

2 Columbus Circle
N.Y. City

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MEMORANDUM ON BEHALF OF KING FEATURES
SYNDICATE, INC., IN SUPPORT OF
APPLICATION FOR COPYRIGHT
REGISTRATION

March 4th, 1937.

C. L. Bouve, Esq.,
Register of Copyrights,
Library of Congress,
Washington, D. C.

Re: C. L. B: GC
SLBK 34, p. 198

Dear Sir:

We are in receipt of your letter dated February 4th, 1937, addressed to our Washington representatives, Mawhinney & Mawhinney, Esqs., with respect to the above identified application for copyright registration of work entitled "King Features Illustrated Weekly Vol. I".

The facts of this case are simple and are as follows:

On or about January 19th, 1937, there was deposited in the Copyright Office one copy of a bound and printed volume entitled "King Features Illustrated Weekly Vol I", consisting of literary material in the form of several pictorially illustrated comic strips or cartoons. This deposit was duly accompanied by a claim of copyright thereto in the name of our client, King Features Syndicate, Inc. This claim of copyright, in due conformity with the regulations of your office, was in the form of an application for registration of the said copyright in the name of King Features Syndicate, Inc., as the proprietor thereof. The statutory fee to effect such registration was

affixed: "Entire contents copyrighted in 1937 by King Features Syndicate, Inc." Neither the volume, as such, nor any of its component comic strips had been published or offered for sale.

At the time of the said deposit and the filing of the said application, there was submitted therewith to the Copyright Office an affidavit of one, Morris Kletter, a newspaper and magazine dealer, attesting to the fact that shortly prior to the date of the said deposit, namely, on or about the 9th day of January, 1937, copies of the said volume had been offered for sale by King Features Syndicate, Inc., and two of such copies had been purchased by the affiant; that, thereafter, the affiant offered the said volumes for sale at retail to the general reading public; that the said volumes could be purchased from the affiant by any customer at the affiant's retail price and without any restriction of any kind; that one of the said volumes had been sold by the affiant.

The said volume, as we have indicated, is composed of separately entitled comic strips arranged in sequential series--each component comic strip series appearing upon a separate page thereof. Many, if not all, of the particular comic strips of each series contain separate copyright notices in the name of the copyright owner, namely, King Features Syndicate, Inc. Upon the title page of the volume the following blanket copyright notice is

affixed: "Entire contents copyrighted in 1937 by King Features Syndicate, Inc."

Neither the volume, as such, nor any of its component comic strips had been published or offered for sale with the consent or authority of King Features Syndicate, Inc., prior to on or about the 9th day of January, the date hereinabove mentioned as contained within Morris Kletter's affidavit.

Separate, subsequent publication of many, if not all, of the component comic strips has taken place by the authority of King Features Syndicate, Inc. The fact of separate, subsequent publication in newspapers or otherwise, however, is, we submit, entirely immaterial to the instant inquiry; we make reference thereto primarily for the purpose of ingenuous disclosure.

Discussion of Applicable Law

The copyrightability of the said component comic strips, under the statute, is not in dispute. Premising copyrightability of this material, has statutory copyright thereto been secured? The pertinent section of the statute is contained in 17 U. S. C. A., Section 9, which provides:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor**."

Statutory copyright, then, is secured "by publication

thereof with notice of copyright".

Publication of a work, for the purpose of initiating statutory copyright thereto, means first publication thereof by authority of the copyright proprietor. (Weil on Copyright Law, Section 311 at p. 125; Lumiere v. Pathe Exchange, 275 Fed. 428) This is clear from sections 23 and 62 of the statute. Section 62 expressly defines publication of a work of which copies are reproduced for sale as "the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright or under his authority".

The first authorized, absolute and unrestricted sale or the offer or exposure to so sell a copy or copies of a work (with proper copyright notice affixed to each copy) will be deemed the legal equivalent of first publication of the work for the purpose of divesting common law copyright and creating statutory copyright. (Stern v. Remick, 175 Fed. 282; Mittenthal, Inc. v. Irving Berlin, Inc., et al, 291 Fed. 714; Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. (2nd) 556; Weil on Copyright Law, sections 306 et seq at page 124; Amdur on Copyright and Practice, section 21 at pages 369 et seq; Drone on Copyright, at page 291) Publication sufficient to secure statutory copyright, it will be noted, is not measured by

That statutory copyright may be secured in and to

the number of copies of the work actually sold or offered for sale to the general public. An unrestricted sale of one copy of the work will suffice, even though that solitary sale be solely for the purpose of bringing copyright into being. (Stern v. Remick, supra; Atlantic Monthly Co. v. Post Publishing Co., supra)

In the instant case it is of paramount significance that the particular comic strips composing the said volume were never published prior to the publication (unrestricted sale or exposure to the general public for such sale) of copies of the volume, and then, in that instance, as component parts thereof. Significantly, this is not a case involving material previously published, either serially or otherwise, and subsequently collected or arranged in volume form. In the instant case, the component material of the composite work derives its initial copyrighted character from the copyright covering the volume as a whole, as a composite entity. In this case, copies of the volume have been published, we submit, within the purview of the statute, and if proper copyright notice has been affixed thereto, then the conditions precedent to statutory copyright have been complied with. The propriety of the form of the notice of copyright fixed to the volume deposited herein is not in question.

That statutory copyright may be secured in and to

a composite work upon compliance with statutory requirements is evident from the clear and unequivocal language of section 3 of the statute. 17 U. S. C. A., section 3 provides:

"The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted **
The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

The composite character of the volume herein, we submit, cannot be seriously contested. It is not only a book (see Fleischer Studios, Inc. v. Freundlich, Inc., et al, 73 Fed. (2nd) 276, in which case the collection of "cartoons depicting a series of unconnected poses" without story or continuity was referred to as a book), but it is also a printed literary work by virtue of the descriptive matter contained therein and the continuity of each comic series. That the volume is composed of so-called printed proofs is without significance (Atlantic Monthly Co. v. Post Publishing Co., supra). As a composite, the work as a whole need not be thematically related. As a composite, one notice of copyright in the name of the proprietor appearing upon the title page (Section 19 of 17 U. S. C. A.) will protect all copyrightable component parts thereof with the same force and effect as if each component part

were separately copyrighted (Dam v. Kirke La Shelle Co., 175 Fed. 902; Da Prato Statuary Co. v. Giuliani Statuary Co., 189 Fed. 90; Mail & Express Co. v. Life Pub. Co., 192 Fed. 899).

That many of the comic strips contained within the volume carry separate copyright notices in the name of King Features Syndicate, Inc., (the blanket notice of copyright appearing upon the title page of the volume is, in all material particulars, identical) should have no bearing upon the instant inquiry by reason of the fact that the separate copyright notices merely serve to make express that which would obtain by implication of law (17 U. S. C. A., Section 3, supra; cases above cited dealing with the sufficiency of one notice of copyright upon a composite work). Manifestly, a plurality of identical copyright notices will not change the nature of the work or destroy its identity as a composite whole.

We have labored the matter of securing copyright in and to the composite volume deposited herein for the reason that until such copyright has been secured no question arises with respect to the so-called completion or perfection of that copyright by the deposit of copies of the work and the filing of application for the registration thereof. Deposit of copies and the filing of claim of copyright (application for registration) presuppose the existence of copyright. (17 U. S. C. A., Section 12;

Mittenthal, Inc. v. Irving Berlin, Inc., et al, supra;
Lumiere v. Pathe Exchange et al, supra)

Section 12 provides, inter alia, as follows:

"After copyright has been secured by publication of the work with notice of copyright as provided in Section 9 of this title, there shall be promptly deposited in the copyright office ** two complete copies of the best edition thereof then published, ** if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in Section 15 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution, ** such copy or copies ** to be accompanied in each case by a claim of copyright."

We submit, in the instant case, copyright has been duly secured in and to the composite volume by compliance with Section 9 of the statute; deposit of the best edition of the volume then published, accompanied by claim of copyright, has been effected, with promptitude, in compliance with Section 12 of the statute (although only one copy of the volume has, to date, been submitted, pending final decision by the Copyright Office in respect of registration, the required additional copy is tendered for deposit herewith); the statutory fee has been tendered on behalf of the applicant in compliance with Section 61 of the statute. It must follow, therefore, that section 10 of the statute is specifically applicable.

17 U. S. C. A., Section 10 provides:

"Such person" (any person entitled to copyright) "may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies and upon such compliance the register of copyrights shall issue to him the certificate provided for in Section 55 of this title".
(Underscoring ours)

Section 10, as above cited, imposes upon the Register of Copyrights an affirmative duty to issue the certificate of copyright registration to any person entitled to copyright and who has complied with the statutory prerequisites. We submit, full and complete compliance has been effected with respect to the composite work herein; and it is, therefore, incumbent upon the Register to issue certificate of copyright registration to the applicant therefor.

Before concluding this memorandum in support of the application of King Features Syndicate, Inc., we should like to answer the questions propounded by you in your said letter dated February 4th, 1937.

Your first point, manifestly begs the question, assumes the very ground of the controversy, so to speak. We submit, it is not within the province of the Copyright Office to adjudge what future use the copyright proprietor may choose to make of his material. Clearly, the particular comic strips contained within the volume herein have not, in the past, been used for the purpose suggested. They

are new works never previously published. Assuming, arguendo, that the strips, or the parts thereof, had been previously published in newspapers as contributions thereto, such publication would be patently immaterial if such publication were not first publication of the material. This leads us again to the fundamental postulate that the subsequent media of publication chosen by the copyright proprietor is entirely without moment on the issue of securing copyright and the registration thereof of a work in a form in which it is first published.

In your letter you make reference to Section 12 of the statute. Doubtless due to inadvertence, your quotation from Section 12 is incomplete and misleading because its context is not set forth. Section 12, it will be noted, provides:

"** if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution**." (Underscoring ours)

It will be noted, only if special registration of the contribution be requested, is it necessary to deposit a "copy of the issue or issues". In the instant matter, special registration of the component parts of the volume is not requested; therefore, the type of deposit therein referred to does not cover this case. It is not a matter

of substituting one type of deposit for another.

That the Copyright Office is not enriched, by the payment of fees, to the extent desired, is a consideration decidedly beside the point. As the statute now stands, the requisite fee has been duly tendered.

The application herein should be granted and certificate of copyright registration, upon acceptance of the tendered fee, should issue forthwith.

Respectfully Submitted,

✓MANHEIM ROSENZWEIG
Attorney for King Features
Syndicate, Inc.

To Col. Brown
March 5, 1937

MEMORANDUM

It has been alleged in the answer that at the time when this material was received in the Copyright Office, to wit, October 10, part of it at least had been already published in the form of contributions to periodicals, and that before action was finally taken in the case by the Copyright Office on the 13th, much more material had been already published in the newspapers in this form.

In other words, at the moment when the Copyright Office was requested to register the material in question as "composite works" consisting of one volume of the "King Features Weekly" and five volumes of "King Features Illustrated Weekly" much of the material therein contained had already fulfilled its obvious function and had physically become contributions to periodicals and made available to the public as such. That this was the case is fully established by evidence consisting (a) of the material itself submitted by the applicant in which it was plainly indicated that such publication in the form of contributions to newspapers had actually taken place and (b) from a comparison of the material contained in the "volumes" with newspapers which establish beyond any question of doubt that at the time this material was received at the office it had been published as contributions to newspapers.

It is true that accompanying the material submitted by the plaintiff were the affidavits of the plaintiff setting out that the material sought to be registered had in fact been published ^{as composite works} on October 6, four days before the receipt of such material by the Copyright Office on the 10th of October, ^{and} as will be later made clear, only two days before publication on October 8 of certain of this material in the form of contributions to newspapers, which date, October 8, ^{as far as can be ascertained} was of the earliest date of publication as such/ contributions of any of the material represented by the proof sheets which constitute "King Features Weekly" and Volumes I, II, III, IV and V of "King Features Illustrated Weekly."

But the Register of Copyrights was not obliged to accept such evidence as destructive of proof to the contrary effect which lay before his eyes in the form of the material submitted for registration by the plaintiff, or to ^{permit the affidavit to} paralyze the processes of reasoning thought, or to deprive him of the privilege of exercising common sense. He knew from the evidence before him that the material submitted by the plaintiff was material primarily intended for distribution to the public in the form of contributions to the daily press; that it was in substance proof sheets of such material such as sent to newspaper editors for their purposes in connection with the actual publication in the newspaper; that the public is not interested in the purchase of such proof sheets; that if it were, it would not pay the newspapers to publish the material in the form of contributions to newspapers; that for this material to have been published by the King Features Syndicate prior to the publishing thereof by the newspapers would probably be violative of the King Features contract with such newspapers unless such "publication" was purely colorable; that in the form presented for registration the material was not gotten up for public distribution or public sale; that the public did not buy things of this type in this way; and that such sales or distributions of this material as could be effected between October 6 and October 8 when part of the material first appeared actually published in the newspapers, was obviously nil and could serve no purpose other than to operate as part of a transparent device in an attempt to overcome the legal obligation to pay the copyright fees required by the Act; that for the plaintiff to collect together in six different groups proof sheets of articles intended to be published as contributions to newspapers and the publication of which as such began not later than forty-eight hours and perhaps thirty-six hours after such alleged publication, did not constitute the publication of "the best edition" of a book or "the first authorized

edition" of a book as these terms of the Copyright Act are used in Section 12 or Section 62. For the above reasons the Register of Copyrights found that there was submitted to his consideration for registration a collection of proof sheets of material which, for the purposes of registration, did not constitute a book but contributions to newspapers before many of which had been published in such newspapers at the time he was requested to register as books. Consequently, even as to that portion of the material which already existed as published contributions to newspapers covered by separate copyright notices at the time the applications for registration of October 10 were made, registration had to be denied for the simple reason that the plaintiff had failed to make the deposits required Sec. 12 of by/the Act.

There were, of course, two other reasons why registration had to be refused: (1) that the material was page proof--a circumstance which would have prevented registration thereof even could the material have been regarded as a book, because page proof material does not constitute the best edition of a work; (2) because, being published with special copyright notice and being, by virtue of such publication, under the obligation of sending in the adequate deposit with a claim for registration, the plaintiff was actually requesting the registration of 423 separate writings the subject of copyright and offering to pay therefor fees in the sum of \$12 instead of \$846 required by Section 61 of the Act. However, consideration of these last two points can be dropped for the present. A separate section will be devoted to the demonstration of the fact that the material offered for registration was page proof. The purpose of the observations and lists immediately following is simply to demonstrate that much of the material in question was material actually constituting ~~intended for~~ contributions to newspapers at the time the applications were filed. The question of the fee requirement will be taken up separately.

Contributions Already Published By or Prior to Oct. 10, 1938.

Contributions Published Oct. 8, 1938

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Thimble Theatre--Popeye	N.Y. Journal-American (Sat. Evening Comic Pictorial)	X	
Polly and Her Pals	" "	X	
Brick Bradford	" "	X	
Mandrake the Magician	" "	X	
Alexander Smart	" "	X	
Elmer	" "	X	
Just Kids	" "	X	
Home Sweet Home	" "	X	
Etta Kett	" "	X	
Krazy Kat	" "	X	
Ted Towers	" "	X	
Little Jimmy	" "	X	
The Pussycat Princess	" "	X	
Pete the Tramp	" "	X	
Felix	" "	X	

[All the above in both proofs and publication, with the exception of "Ted Towers" which carries the release date 10-8, carry the release date 10-9, but it is interesting to note that they were published in this publication the day before. Furthermore, the above-listed material appears in the proof copies uncolored, but colored in the publication.]

Contributions Published Oct. 9, 1938

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Tillie the Toiler	Washington Herald	X	
Tillie the Toiler-- Fashion Parade	Washington Herald		X
Sappo	San Francisco Examiner	X	
Thimble Theatre--Popeye	Washington Herald	X dupl.	
Curley Harper	Houston (Texas) Post	X	
Tim Tyler's Luck	Washington Herald	X	
Bunky	New York Journal-American	X	
Barney Google	Washington Herald	X	
Rosie's Beau	Forth Worth (Texas) Star-Telegram	X	
Bringing Up Father	Washington Herald	X	
Col. Potterby and the Duchess	San Francisco Examiner	X	
Blondie	Washington Herald	X	
Ming Foo	Louisville Courier-Journal	X	
Little Annie Rooney	Washington Herald	X	
It's Papa Who Pays	New York Journal-American	X	
Toots and Casper	Washington Herald	X	
Jungle Jim	Washington Herald	X	
Flash Gordon	Washington Herald	X	
The Squirrel Cage	Houston (Texas) Post	X	
Room and Board	Washington Herald	X	
The Little King	New York Journal-American	X	
Dingle-Hoofer and His Dog	Washington Herald	X	
The Katzenjammer Kids	Washington Herald	X	

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Prince Valiant	Washington Post		X
Aunt Min	Enid Morning News	X	
Seeing Stars	San Francisco Examiner	X	
<u>Believe It or Not</u>	<u>Washington Herald</u>	<u>X</u>	

Contributions Published Oct. 10, 1938

Tillie the Toiler	Washington Herald	X	
Thimble Theatre--Popeye	Chicago American		X
Just Kids	Washington Times	X	
Tim Tyler's Luck	Chicago American		X
Polly and Her Pals	Chicago American		X
Barney Google	Washington Herald	X	
Bringing Up Father	Washington Herald	X	
Blondie	San Francisco Examiner	X	
Little Annie Rooney	Chicago American		X
Toots and Casper	Washington Herald	X	
	Chicago American		X
Radio Patrol	Washington Herald	X	
Mandrake the Magician	Chicago American	X	
Krazy Kat	San Francisco Examiner	X	
Room and Board	Chicago American		X
Inspector Wade	Lawrence (Mass.) Eagle	X	
The Phantom	New York Journal-American	X	
Secret Agent X9	Los Angeles Examiner	X	
Barney Baxter in the Air	Washington Times	X	
Believe It or Not	San Francisco Examiner	X	

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Magazine Page for Everybody	Lawrence (Mass.) Eagle		Inad.
Sonnysayings	Philadelphia Inquirer	X	
Sunflower Street	Cleveland Plain Dealer	X	
They'll Do It Every Time	Chicago American	X	
Cook Coos	San Francisco Examiner	X	
Today's Cross-Word Puzzle (Sheffer)	Baltimore News Post	X	
Etta Kett	Southbend Tribune		Inad.
Muggs and Skeeter	Southbend Tribune		X
Daily Cross Word Puzzle	Chicago American	X	
Big Sister	Davenport Democrat	X	
Brick Bradford	Washington Times	X	
Scott's Scrapbook	New Haven Register	X	
The Old Home Town	Davenport (Iowa) Democrat	X	
Barclay on Bridge	Lawrence (Mass.) Eagle	X	
Grab Bag	Lawrence (Mass.) Eagle		X
One Word Led to Another-- Men of Fifty	Baltimore News Post	X	
What's the Answer (partially published)	Los Angeles Examiner	X	
The Marry-Go-Round--Mrs. Solomon Says	Baltimore News Post	X	
Advice to the Lovelorn-- What Makes a Successful Marriage	Elmira (N.Y.) Advertiser		Inad.
Advice to the Lovelorn-- Fairfax Letters (partially published)	Elmira (N.Y.) Advertiser		Inad.
What Do You Know?--Test One	Baltimore News Post	X as to ans.	X as to ques.
Beauty by Helen Jameson-- Color Rinses for Hair	Johnstown (Pa.) Tribune	X	

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Listen, World!	Baltimore News Post		X
Your Figure, Madame-- Bread, etc.	Baltimore News Post		X

Contributions Published Oct. 11, 1938

Tillie the Toiler	Washington Herald	X	
Thimble Theatre--Popeye	Chicago American		X
Just Kids	Washington Times	X	
Tim Tyler's Luck	Chicago American		X
Polly and Her Pals	Chicago American		X
Barney Google	Washington Herald	X	
Bringing Up Father	Washington Herald	X	
Blondie	San Francisco Examiner	X	
Little Annie Rooney	Chicago American		X
Toots and Casper	Washington Herald	X	
Radio Patrol	Washington Herald	X	
Mandrake the Magician	Chicago American		X
Krazy Kat	San Francisco Examiner	X	
Room and Board	Chicago American	X	
Inspector Wade	Lawrence (Mass.) Eagle	X	
The Phantom	New York Journal-American	X	
Secret Agent X9	Los Angeles Examiner	X	
Barney Baxter in the Air	Washington Times	X	
Believe It or Not	San Francisco Examiner	X	
Magazine Page for Every- body	Lawrence (Mass.) Eagle		Inad.

[There are 14 separate contributions on this page
sought to be covered by this copyright notice]

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Sonnysayings	Philadelphia Inquirer	X	
Sunflower Street	Cleveland Plain Dealer	X	
They'll Do It Every Time	Chicago American	X	
Cook Coos	San Francisco Examiner	X	
Today's Cross-Word Puzzle (Sheffer)	Baltimore News Post	X	
Etta Kett	South Bend Tribune		Inad.
Muggs and Skeeter	South Bend Tribune		X
Daily Cross Word Puzzle	Chicago American	X	
Big Sister	Davenport (Iowa) Democrat	X	
Brick Bradford	Washington Times	X	
Scott's Scrapbook	New Haven Register	X	
The Old Home Town	Davenport (Iowa) Democrat	X	
Sally's Sallies	Lawrence (Mass.) Eagle	X	
Barclay on Bridge	Lawrence (Mass.) Eagle	X	
One Word Let to Another-- Facts Not Worth Knowing	Baltimore News Post		X
What's the Answer? (partially published)	Los Angeles Examiner	X	
Good Manners--Double Ring Ceremony	New Haven Register	X	
Advice to the Lovelorn-- Fairfax Letters (partially published)	Elmira Advertiser (N.Y.)		Inad
What Do You Know--Test II	Baltimore News Post	X as to ans.	X as to questions
Beauty by Helen Jameson-- Fashions in Eyeglasses	Johnstown (Pa.) Daily Tribune	X	
Listen, World!	Baltimore News Post		X
Your Figure, Madame-- No Desk Chair Spread	Baltimore News Post		X

Contributions Published Oct. 12, 1938

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Tillie the Toiler	Washington Herald	X	
Thimble Theatre--Popeye	Chicago American		X
Just Kids	Washington Times	X	
Tim Tyler's Luck	Chicago American		X
Polly and Her Pals	Chicago American		X
Barney Google	Washington Herald	X	
Bringing Up Father	Washington Herald	X	
Blondie	San Francisco Examiner	X	
Little Annie Rooney	Chicago American		X
Toots and Casper	Chicago American Washington Herald	X	X
Radio Patrol	Washington Herald	X	
Mandrake the Magician	Chicago American	X	
Krazy Kat	San Francisco Examiner	X	
Room and Board	Chicago American	X	
Inspector Wade	Lawrence (Mass.) Eagle	X	
The Phantom	New York Journal-American	X	
Secret Agent X9	Los Angeles Examiner	X	
Barney Baxter in the Air	Washington Times	X	
Believe It or Not	San Francisco Examiner	X	
Magazine Page for Every- body	Lawrence (Mass.) Eagle		X
[There are 14 separate articles on this page sought to be covered by this copy- right notice]			
Sonmysayings	Philadelphia Inquirer	X	
Sunflower Street	Cleveland Plain Dealer	X	

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
They'll Do It Every Time	Chicago American	X	
Cook Coos	San Francisco Examiner	X	
Today's Cross Word Puzzle	Baltimore News Post	X	
Krazy Kat	South Bend Tribune		Inad.
Muggs and Skeeter	South Bend Tribune		X
Daily Cross Word Puzzle	Chicago American	X	
Big Sister	Davenport (Iowa) Democrat	X	
Brick Bradford	Washington Times	X	
Scott's Scrapbook	New Haven Register	X	
The Old Home Town	Davenport (Iowa) Democrat	X	
Barclay on Bridge	Lawrence (Mass.) Eagle	X	
Grab Bag	Lawrence (Mass.) Eagle	X	
One Word Led to Another— Dying for Dear Old Rutgers	Baltimore News Post		X
What's the Answer (partially published)	Los Angeles Examiner	X	
The Marry-Go-Round— October Wedding Bells	Baltimore News Post		X
Advice to the Lovelorn— Hair-Trigger Temper etc.	Elmira (N.Y.) Advertiser		Inad.
This Day in History	Fort Worth (Texas) Star-Telegram		X
What Do You Know--Test 3	Baltimore News Post	X as to ans.	X as to questions
Beauty by Helen Jameson-- Beauty Flaws, etc.	Johnstown (Pa.) Daily Tribune	X	
Listen, World!	Baltimore News Post		X
Your Figure, Madame-- Miss America, etc. etc.	Baltimore News Post		X

Contributions Published Oct. 13, 1938

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Tillie the Toiler	Washington Herald	X	
Thimble Theatre--Popeye	Chicago American		X
Just Kids	Washington Times	X	
Tim Tyler's Luck	Chicago American		X
Polly and Her Pals	Chicago American		X
Barney Google	Washington Herald	X	
Bringing Up Father	Washington Herald	X	
Blondie	San Francisco Examiner	X	
Little Annie Rooney	Chicago American		X
Toots and Casper	Washington Herald	X	
Radio Patrol	Washington Herald	X	
Mandrake the Magician	Chicago American	X	
Krazy Kat	San Francisco Examiner	X	
Room and Board	Chicago American	X	
Inspector Wade	Lawrence (Mass.) Eagle	X	
The Phantom	New York Journal-American	X	
Secret Agent X9	Los Angeles Examiner	X	
Barney Baxter in the Air	Washington Times	X	
Believe It or Not	San Francisco Examiner	X	
Magazine Page for Every- body	Lawrence (Mass.) Eagle		Inad.
[There are 13 separate contributions on this page sought to be covered by this copyright notice.]			
Sonnysayings	Philadelphia Inquirer	X	
Sunflower Street	Cleveland Plain Dealer	X	

NamePublication
(Oct. 13 continued)With
NoticeWithout
Notice

They'll Do It Every Time

Chicago American

X

Cook Coos

San Francisco Examiner

X

Today's Cross-word Puzzle

Baltimore News Post

X

Etta Kett

South Bend Tribune

Inad.

Muggs and Skeeter

South Bend Tribune

X

Daily Cross Word Puzzle

Chicago American

X

Big Sister

Davenport (Iowa) Democrat

X

Brick Bradford

Washington Times

X

Scott's Scrapbook

New Haven Register

X

The Old Home Town

Davenport (Iowa) Democrat

X

Barclay on Bridge

Lawrence (Mass.) Eagle

X

Grab Bag

Lawrence (Mass.) Eagle

X

One Word Led to Another—

A Gander at the Glamorous

Baltimore News Post

X

What's the Answer?

(partially published)

Los Angeles Examiner

X

Good Manners—Proper Use
of Mrs. etc. etc.

New Haven Register

X

Advice to the Lovelorn—
Fairfax Letters

(partially published)

Elmira (N.Y.) Advertiser

Inad.

This Day in History

Fort Worth (Texas) Star-Telegram

X

What Do You Know—Test 4

Baltimore News Post

X as to
ans.X as to
questions

Beauty by Helen Jameson—

Treatment for Enlarged, etc. Johnstown (Pa.) Daily Tribune

X

Listen, World!

Baltimore News Post

X

Your Figure, Madame—

Kitty Carlisle

Baltimore News Post

X

Contributions Published Oct. 14, 1938

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Tillie the Toiler	Washington Herald	X	
Thimble Theater--Popeye	Chicago American		X
Just Kids	Washington Times	X	
Tim Tyler's Luck	Chicago American		X
Polly and Her Pals	Chicago American	X	
Barney Google	Washington Herald	X	
Bringing Up Father	Washington Herald	X	
Blondie	San Francisco Examiner	X	
Little Annie Rooney	Chicago American		X
Toots and Casper	Chicago American Washington Herald	X	X
Radio Patrol	Washington Herald	X	
Mandrake the Magician	Chicago American	X	
Krazy Kat	San Francisco Examiner	X	
Room and Board	Washington Times	X	
Inspector Wade	Lawrence (Mass.) Eagle	X	
The Phantom	New York Journal-American	X	
Secret Agent X9	Los Angeles Examiner	X	
Barney Baxter in the Air	Washington Times	X	
Believe It or Not	San Francisco Examiner	X	
Magazine Page for Everybody	Lawrence (Mass.) Eagle		Inad.
[There are 11 separate contributions on this page sought to be covered by this copyright notice.]			
Sonnysayings	Philadelphia Inquirer	X	
Sunflower Street	Cleveland Plain Dealer	X	

<u>Name</u>	<u>Publication</u> (Oct. 14 cont'd.)	<u>With Notice</u>	<u>Without Notice</u>
They'll Do It Every Time	Chicago American	X	
Cook Coos	San Francisco Examiner	X	
Today's Cross-word Puzzle	New York Journal-American		X
Etta Kett	South Bend Tribune		Inad.
Muggs and Skeeter	South Bend Tribune		X
Daily Cross Word Puzzle	Chicago American		X
Big Sister	Davenport (Iowa) Democrat	X	
Brick Bradford	Washington Times	X	
Scott's Scrapbook	New Haven Register	X	
The Old Home Town	Davenport (Iowa) Democrat	X	
Sally's Sallies	Lawrence (Mass.) Eagle	X	
Barclay on Bridge	Lawrence (Mass.) Eagle		X
Grab Bag	Lawrence (Mass.) Eagle		X
One Word Led to Another-- Inspector Byrnes	Los Angeles Examiner	X	
What's the Answer? (partially published)	Los Angeles Examiner	X	
The Marry-Go-Round-- How to be Popular	New Haven Register		X
Advice to the Lovelorn-- What Makes a Successful Marriage	Elmira (N.Y.) Advertiser		Inad.
What Do You Know--Test 5	New York Journal-American		X
Beauty by Helen Jameson-- Girls Look Funny, etc.	Johnstown (Pa.) Daily Tribune	X	
Listen, World!--Where shall they learn about good?	New York Journal-American		X

Contributions Published Oct. 15, 1938.

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Tillie the Toiler	Washington Herald	X	
Thimble Theatre--Popeye	Chicago American		X
Just Kids	Washington Times	X	
Tim Tyler's Luck	Chicago American		X
Polly and Her Pals	Chicago American		X
Barney Google	Washington Herald	X	
Bringing Up Father	Washington Herald	X	
Blondie	San Francisco Examiner	X	
Little Annie Rooney	Chicago American		X
Toots and Casper	Washington Herald	X	
Radio Patrol	Washington Herald	X	
Mandrake the Magician	Chicago American	X	
Krazy Kat	San Francisco Examiner	X	
Room and Board	Washington Times	X	
Inspector Wade	Lawrence (Mass.) Eagle	X	
The Phantom	New York Journal-American	X	
Secret Agent X9	Los Angeles Examiner	X	
Barney Baxter in the Air	Washington Times	X	
Believe It or Not	San Francisco Examiner	X	
Magazine Page for Every- body	Lawrence (Mass.) Eagle		Inad.
[There are 12 separate contributions on this page sought to be covered by this copyright notice.]			
Sonnysayings	Philadelphia Inquirer	X	
Sunflower Street	Cleveland Plain Dealer	X	

	<u>Publication</u> (Oct. 15 cont'd.)	<u>With</u> <u>Notice</u>	<u>Without</u> <u>Notice</u>
They'll Do It Every Time	Chicago American	X	
Cook Coos	San Francisco Examiner	X	
Today's Cross-word Puzzle	Baltimore News Post	X	
Etta Kett	South Bend Tribune		Inad.
Muggs and Skeeter	South Bend Tribune		X
Daily Cross Word Puzzle	Chicago American		X
Brick Bradford	Washington Times	X	
Scott's Scrapbook	New Haven Register	X	
Sally's Sallies	Lawrence (Mass.) Eagle	X	
Barclay on Bridge	Lawrence (Mass.) Eagle		X
Grab Bag	Lawrence (Mass.) Eagle		X
One Word Led to Another	Baltimore News Post		X
What's the Answer? (partially published)	Los Angeles Examiner	X	
Good Manners--Attire for Buffet Supper, etc.	New Haven Register	X	
What Do You Know--Test 6	Baltimore News Post	X as to ans.	X as to questions
Beauty by Helen Jameson Voices Sweet and Low	Johnstown (Pa.) Daily Tribune	X	
Listen, World!	Baltimore News Post	X	

Contributions Published Oct. 17, 1938

<u>Name</u>	<u>Publication</u>	<u>With Notice</u>	<u>Without Notice</u>
Your Individual Horoscope (for Tues. Oct. 18)	New York Journal-American		X

Contributions Published Oct. 18, 1938

Your Individual Horoscope (for Wednesday Oct. 19)	New York Journal-American		X
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Contributions Published Oct. 19, 1938

Your Individual Horoscope (for Thurs. Oct. 20)	New York Journal-American		X
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Contributions Published Oct. 20, 1938

Your Individual Horoscope (for Friday, Oct. 21)	New York Journal-American		X
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Contributions Published Oct. 21, 1938

Your Individual Horoscope (for Sat. Oct. 22)	New York Journal-American		X
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Contributions Published Oct. 22, 1938

Your Individual Horoscope (for Sunday Oct. 23)	New York Journal-American		X
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Contributions Published Oct. 23, 1938

Your Individual Horoscope (for Mon. Oct. 24)	New York Journal-American		X
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The above lists cover 297 separate publications of separate articles published as separate contributions to newspapers. As before observed, the material submitted by the plaintiff appears to cover at least 423 separate contributions covered by separate copyright notice. The newspapers in which the material appears as published have been separated and collected in the office of the Register of Copyrights. It would be possible, of course, to have this collection of newspaper evidence complete, although the process of identification is not a simple one. There appears to be available no list of columnists--that is to say, a list of such writers identifying their writings with the particular newspaper in which publication of this material has taken place. In obtaining the evidence the method pursued was to go to the Periodical Division of the Library of Congress, examine a likely looking newspaper, and if it contained King Features material, to send to the stacks for the particular publications indicated by release dates on the page proof submitted by the plaintiff--or, in the case of "King Features Weekly" where release dates only appear rarely, examine the issues of such newspaper including and subsequent to Oct. 8 and 9.

Notes for use in pleading re King
Features Syndicate Case

(1) In connection with an item in Vol. 4 of "King Features Illustrated Weekly" to wit, "Sunday X Word Puzzle No. 724": The applicant states that this volume was first published on October 6, 1938, and yet in connection with this item it contains a statement "Herewith find solution to Puzzle No. 724 published last Sunday." If this information were to be taken literally-- if this were a piece of information to be actually delivered to the public by virtue of publication of this material the reference would have been to a word puzzle published on October 2. But obviously it would seem that the puzzle referred to was one published on October 16. The "last Sunday" would be the Sunday preceding the Sunday of October 23, which is the date of the release. [Check this up]

(2) With respect to "Movie Star Crossword Puzzle" bearing release date of 10-16, this is accompanied by the following instruction to the printer and not to the public: "Following is the solution of the Movie Star Crossword Puzzle published a week ago." The release date for this particular solution is given as 10-16. The corresponding puzzle must have been published, then, on 10-9 or Oct. 9. If this volume had been really published on Oct. 6 as is contended by the applicant, we should have the solution of the crossword puzzle published for the first time before the puzzle to which it is the solution was published. We should be able to establish the fact of publication.

It is felt, however, that with the newspaper material already collected, the material submitted by the plaintiff, together with the newspapers, constitute overwhelming proof of the fact that the type of literary work submitted for registration as deposits is, in fact, contributions to periodicals and that it was published as such to a very great extent prior to action taken by the Copyright Office in connection with the question of its acceptance for registration.

To be more specific on this point, an examination of the above material shows that on the 8th and 9th of October, 1938, before any application for registration was received from the plaintiff, there had appeared in the nature of contributions in the public press 42 of the articles in question, two of which strangely enough had been published with inadequate copyright notice.

On October 10, the day on which the material was received from the plaintiff at least 43 more of these articles had been published as contributions in the daily press, no less than 15 of which had been published without adequate copyright notice--making a total of at least 85 articles published as contributions to periodicals on the date when the material was received for registration in the Copyright Office.

It further appears that on October 11 at least 42 more of these articles had been published as contributions in the daily press, 13 of which bore inadequate copyright notice.

From the above it follows that when this material was passed upon by the Examining Section of the Copyright Office on October 11, at least 137 of such articles had already been published as contributions in the daily press.

On October 12 at least 43 more had been thus published, 15 of which bore inadequate copyright notices, and on October 13 an additional 43 in 12 of which

adequate copyright notice did not accompany the publication.

It must be admitted that this office acted with dispatch in connection with the handling of these cases, because the applications and material were received on the 10th and the action of the Copyright Office in rejecting the same was communicated to the plaintiffs on October 13. When that communication was dispatched, at least 213 of these articles had been published as contributions in the daily press, 57 of which had been published with inadequate copyright notice and thereby relegated to the public domain.

It is interesting to note that on the 14th of October, 38 more articles were published as contributions in the newspapers, 15 of which did not have adequate copyright notices; and on the 15th of October, 39 more were thus published, 12 of which lacked the copyright notice required by law.

It further appears that in seven publications of the New York Journal-American dated October 17 to October 23, inclusive, seven more of these articles were by the 23rd of October published as contributions to newspapers, no one of which contained the adequate copyright notice.

Let me reiterate at this point that from the facts in evidence there cannot exist the slightest doubt that each and every proof sheet of material covered by a separate copyright notice in "King Features Illustrated Weekly" and "King Features Weekly" fulfills its function of first bona fide publication to the public by being published as a contribution to the daily press within two or three weeks following the deposit of the material with the Copyright Office in connection with the application for the registration thereof as a "composite work." If the examination made, the results of which are made available here, is any test, one can be more than certain that a certain percentage of the material not covered in the above list when published appeared without the adequate copyright notice, and hence is in the public domain.

But what is established here--by virtue of the evidence afforded by the

by the plaintiff's deposits and the corresponding newspaper publications—is that at the time final action was taken upon these applications by the Copyright Office, acting with at least reasonable dispatch—that is, by October 13—of the material submitted by the plaintiff for registration on October 10, at least 213 of the articles, of which such material constituted the page proof, already existed as published contributions to periodicals and that of such publications at least 57 had passed into the public domain by virtue of having been published without a copyright notice.

That the Material Submitted was Page Proof

That the material in question is page proof is a fact which is so plainly proven as, it seems to me, to permit a denial on no reasonable ground. The physical aspect of the "volumes" of "King Features Illustrated Weekly" was of itself sufficient reasonably to establish this fact, this because of the nature of the material itself—material intended for contribution to newspapers; because, in the case of comic strips with which all the world is acquainted as contributions to newspapers, there was affixed to each article what appeared to any reasoning human being to be a release date; because for the release dates corresponding to the Sundays of the month, in the case of comic strips which we all know to be colored in a great majority of cases, the material submitted by the plaintiff was not colored; because of information received in the Copyright Office that the physical form in which this material was presented for registration was precisely the form in which it was sent to the newspapers for publication as contributions to periodicals; because in some instances when the subject matter was not comic strips both in the volumes of "King Features Illustrated

7, "Weekly" and "King Features Weekly" there were definite instructions, speaking in so many words, of the date of release; because in the case of articles not constituting comic strips, these articles were printed in newspaper column form; because, particularly in the case of "King Features Weekly", on the face of many of these articles there were interpolated instructions as to the form in which and the precise type in which certain words or lines were to be printed. The Register of Copyrights and others handling the material in the Copyright Office would have taken leave of their senses if they had reached any conclusion other than that printed matter covering one side of a sheet only containing printed instructions as to how part of the material involved should be produced in print was not a preliminary printing or page proof; finally, because, although each so-called "volume" bore on its title page in a manner impossible to escape the attention of any person picking up such volume, that the material enclosed therein was copyrighted in 1938 by the King Features Syndicate, nevertheless, with one or possibly two exceptions--obviously oversights--each individual article in these volumes was itself covered by a separate copyright notice.

So much for the evidence of page proof afforded by the material submitted by the plaintiff for registration. This in itself, as above indicated, seems more than sufficient to prove the fact. But when, in addition to this evidence, we have an exact reproduction of this material in the public press in the form of contributions to newspapers--except that in most instances the Sunday editions are colored--that in a number of instances the copyright notice has been omitted; and that in still other instances only a portion of any particular "copyrighted" article contained in these collections is actually republished, the matter of further debating the question of page proof calls for no further consideration.

Yet it may not be amiss to call attention in this connection to the extremely significant fact that within two days after the "publication" of the page proof

some of it and a very material portion of it appeared in one of the great papers of New York City--the Journal-American which contains perhaps more comic strip matter than any other publication. This circumstance is material to the point of page proof as it is to the matter of "publication." I believe that this matter of alleged publication should be gone into with great care. While I feel that the Government has a perfectly sound case without the issue of spurious publication being raised, I believe that the fact that the publication was spurious can probably be very easily established. I have reason to believe that care was taken to see to it that the alleged publication took place in a small town and under conditions where it would really amount to no publication at all. I doubt if we would find that there were five cases of sales. I believe that it would be impossible to prove that one sale was bona fide from the standpoint of the Copyright Act. As I have already indicated, the interests of King Features as a news-providing syndicate and the newspapers themselves ^{anticipating} could not, in my opinion, tolerate real publication, ~~including~~ publication in the newspapers which the syndicate is intended to serve and serves. Moreover, I believe that it would be advisable to obtain contracts covering King Features Syndicate material. This should be procured in Washington without any difficulty inasmuch as the Washington Herald deals largely with King Features Syndicate material.

Now as to the question of sufficiency of fees. Any contribution to a newspaper which is made the subject of a special claim of copyright must be a work subject to copyright. Under Section 12 the deposit of copies and the submission to the Copyright Office of a claim of copyright in connection with such deposit is made mandatory. It was obviously intended by the Act that whenever I publish any writing and obtain copyright thereto by publication, coupled with the affixing of the adequate copyright notice, I should submit an application for registration

thereof to the Copyright Office. I may not submit that application, but that does not affect my obligation under Section 12 to do so. In other words, the affixing of a copyright notice to a contribution published in a newspaper aside from any copyright notice ^{generally covering the contents of} ~~appearing in the contribution in~~ the newspaper itself, constitutes a special claim of copyright in the contribution, as such, and this in turn calls under Section 12 for an application for the registration of claim of copyright of such contribution. Section 61 provides that in each such case a fee of \$2 is demanded--I say each such case because no one can deny that a writing, whether in the nature of a book or of a contribution to a periodical, provided it is based on authorship and is not opposed to public policy and is not in the public domain, is a "work subject to copyright."

When I first took action with respect to this King Features material in October of 1936, their attorneys came from New York and discussed the matter at full length. They frankly admitted that the only reason why they presented the material in this form was in order to avoid the payment of fees. Needless to say, they also stated that they would hardly feel like stipulating to the fact of having made such a statement or to the fact itself.

My recollection is that in 1928 the registration fee was increased from \$1 to \$2 in the case of books--which, of course, includes contributions to periodicals. I believe that the records of this office will show that prior to the change the material submitted by King Features Syndicate amounted in fees to something approximating \$500 a month (for the month of March). The amendment went into effect July 1, 1928 to the end of the year. The amount paid by them in registration fees was, roughly speaking, some \$400. during the rest of that year.

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I S S U E:

The Register of Copyrights refuses to accept for deposit for the enrichment of the Library of Congress, as provided by Sections 13 and 59 of the Copyright Act, page-proof material ~~of matter~~ intended for publication and now actually published in newspaper form, on the ground that he lacks authority to accept such material by way of deposit in view of Sections 10, 12, 13, 54, 59 and 62 of the Copyright Act.

That it was not the intention of Congress that the Register should accept for registration such and any copy of material printed in accordance with the manufacturing clause and published with the copyright notice in such plain by the provision of Section 12 which provides that after the securing of copyright by publication with notice "there shall be promptly deposited in the Copyright Office or in the suit designated to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published." The applicant next, after such publication, sent two registrations for the deposit accompanying the application for registration fulfill the requirements of the Act. Copies sent be (1) complete and they must be (2) copies of the best edition published at the time deposit is made. That the applicant is endeavoring to force the Register to do so is to accept twenty proof sheets of material printed from type set for newspaper publication of the story entitled "In Old Chicago." These proof sheets are submitted in paper covers attached together to constitute what the applicant says is a book; and he applies for the registration of this material as a book. He does not deny that the material

The real issue raised by the Fox Film Corporation is, with the exception to be recorded later in this memorandum, a new one. The contention of the Fox Film Corporation is that it has caused a certain writing to be printed in accordance with the manufacturing provisions of the Copyright Act; that it has published this printed matter by offering it for sale or selling it to the public and has attached thereto the copyright notice required by the Act. These facts being established, the conclusion reached by the applicant is that the Register of Copyrights is bound to accept the material for registration and to issue a certificate of registration to the applicant.

The soundness of the proposition depends upon the fulfillment of one very necessary condition, to wit, that the deposit made corresponds to the deposit upon the making of which the Register is in duty bound to accept the material for registration. The Attorney General has already held that the question as to whether a deposit made by an applicant for registration meets the requirements of the Act must be determined by the Register. Thus, where the applicant submitted a deposit claiming it to be a work of art within the meaning of the Act and the Register refused registration on the ground that it was not such a work of art, the Attorney General held in an opinion (Official Opinions of the Attorney General of the United States, Vol. 28, pp. 557-561) that this was a matter which lay within the discretion of the Register. That situation finds its duplication here in the sense that the material deposited by the applicant does not, in the opinion of the Register, constitute material which it was ever contemplated in the Act should be received for registration. It goes without saying that it was never suggested by the Attorney General in his opinion that unreasonable or arbitrary action by the Register could be sustained. That principle is fully recognized by the Register in this instance. He feels that his action in refusing to accept this material finds its authority in the plain terms and obvious intent of the Act.

That it was not the intention of Congress that the Register should accept for registration each and any copy of material printed in accordance with the manufacturing clause and published with the copyright notice is made plain by the provision of Section 12 which provides that after the securing of copyright by publication with notice "there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published." The applicant must, after such publication, meet two requirements before the deposit accompanying the application for registration fulfills the requirements of the Act. Copies must be (1) complete and they must be (2) copies of the best edition published at the time deposit is made. What the applicant is endeavoring to force the Register to do is to accept twenty proof sheets of material printed from type set for newspaper publication of the story entitled "In Old Chicago." These proof sheets are assembled in paper covers stitched together to constitute what the applicant says is a book; and he applies for the registration of this material as a book. He does not deny that the material

submitted is in this form because of the intention at the time the type was set to publish it in a newspaper; but, he says, since a certain number of such copies have been placed on sale and sold to the public in this form, the material in this form constitutes "the best edition" because it is the only "edition." In other words, he construes the Act as attributing to the intention of Congress the willingness to accept as the "best edition" of a written work material in an intermediate stage of bookmaking known as page proof form. Taking just so much and so much only of the Act as has been quoted up to this point, two things seem to be clear: (1) that the provision of Section 12 providing for the character of the deposits does not contemplate by the use of the term "complete" or of the term "best edition" material which is composed of page proof and (2) that it was not the intention of Congress that by collecting separate pages of page proof and binding it together, this should be regarded as a "best edition." Page proof is what is known as an intermediate process and hence an incomplete process in the art of bookmaking, and the fact that Congress provided that the deposits of this type should be complete, makes it idle to argue that the legislators had in mind the assemblage of recognizably incomplete matter and that their provision could be voided by the transparent device of putting such matter between paper covers and calling it a complete copy of a best edition.

But it is not in Section 12 alone or necessarily fundamentally that the weakness of the applicant's argument is to be found; for Section 12 does not, as does Section 59, make it clear just why it is that deposits of published writings shall constitute a complete and best edition of such writings. Under the preceding Copyright Act there was required to be deposited with the Register of Copyrights "two copies of the copyright book" in order that the applicant might secure his copyright. Under the present Act this copyright is secured irrespective of whether or not he makes the deposits required by the Act. This is a point of fundamental importance in connection with the situation here discussed. While under the former Act and preceding Copyright Acts one of the purposes of the requirement as to deposits was and always has been the enrichment of the Congressional Library, the Smithsonian Institution or some other national collection belonging to the people, it none the less served, as already stated, a double purpose by being made one of the conditions upon which copyright was secured. But under the present Act that second condition is eliminated, and the only purpose which the requirement of the deposit now serves is the enrichment of the Congressional Library. And in this connection let it be noted at the outset that the Copyright Office is not the ultimate depository of such deposits. Their presence in this office is transient. Their ultimate destination is the Library of Congress to the extent that all the great mass of material deposited with the Copyright Office is day by day submitted to an inspection by a committee of the Library of Congress designated for that purpose in order that such volumes as are required for that institution may be made a part of it. Let me quote from the statement of the Librarian of Congress before the Committee on Patents, House of Representatives, on Wednesday, June 6, 1906:

"The other matter is that of copyright deposits. The volume of these is now prodigious. During the last year alone the articles deposited exceeded 200,000 in number. A large proportion of these are of great value to the Library and are drawn up into it. The rest remain in the cellar. The accumulations in the cellar now number a million and a half items. Many of these would be useful in other Government libraries; for instance, medical books in the library of the Surgeon-General's Office. Some of them might be useful in exchange with other libraries. A few might have value in exchange with dealers. The remainder are a heavy charge upon the Government for storage and care, without any corresponding benefit. They ought to be returned to the copyright proprietors if they want them, or, if not wanted, destroyed. Such dispositions are, I believe, already within the authority of law; but it is fair that they should be expressed. The bill (secs. 58 and 59) definitely expresses them. I ask your attention to them in due course. They have been accepted by the conferences, and therefore by the interests outside of the Government most nearly concerned with their operation. But they may awaken some apprehension elsewhere because of a quite common misunderstanding of the significance of the deposit and its relation to the copyright protection.

"The original purpose of such deposits was the enrichment of the Library. This is clear from their history, both in this country and abroad. They were made a condition of securing copyright, but they had no continuing relation to the copyright once secured. In England, for instance, the copies required (now five) are to be for the use of the libraries—five libraries—no one of which is the office of registration for copyrights. The earliest act in this country was that of Massachusetts, in 1783, which exacted a copy as a gift to the library of the University of Cambridge, Harvard University, 'for the use of said university' which was not the office of copyright. The earliest act providing for deposit in the Library of Congress, that of 1846, provided that the copyright proprietor should give one copy of the book to this Library, and at the same time it provided that he should give one copy to the library of the Smithsonian for the use of that library.

"In 1867 the library of the Smithsonian became a part of the Library of Congress. The act of 1870 provided two copies, both to be addressed to the Library of Congress. But by that same act of 1870 the Library of Congress became the office of registration for copyright; and from that time, and because the failure to deposit not later than the date of publication actually voided the copyright, an impression has grown up that the articles deposited are an integral part of the record of registration, and have a peculiar sanctity as such. The fact of the deposit has been and will be an integral part of the record, and in times past this could most readily be proved by the copies themselves, the law providing neither for a certificate to the claimant admitting the receipt of the deposit nor an entry in the official record showing it. But hereafter the fact of deposit will be proved by the certificate itself."

An examination of Section 59 of the Act will establish at once the correctness of this conclusion and make it perfectly clear why in Section 12 Congress provided that of such material two complete copies of the best edition should be sent to the Copyright Office as a way station between the publisher and the Library of Congress. So insistent was Congress upon the point that the Library of Congress, and through it the people of the United States, should become without cost to the Government the owners of two complete copies of the best edition of such deposits that Section 12 provides that until such deposits are made, the copyright owner shall be barred from bringing infringement suit in a Federal court; and Section 13 goes still further, for it provides that in default of such deposits, where the proprietor of the copyright has been requested by the Register of Copyrights to make them and has failed to comply with the request, he "shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

The obvious purpose of the last quoted provision is to insure that the Library of Congress be enriched by the deposits which fulfill the conditions set out in the phrase contained in Section 12 regarding the deposit of two complete copies of the best edition. They are to become the property of the Government and people of the United States without cost to it or them.

Now, these deposits being destined to the Library of Congress, what is the precise purpose that they are intended to serve? This is made clear by Sec. 59. That Section reads as follows:

"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

Here, then, stands plainly revealed in the words of the Act the purpose which deposits shall serve. This, too, goes far to explain the requirement that the deposits shall consist of the best edition of the work published at the time of deposit. These deposits, as already indicated, are for Library purposes fundamentally and outstandingly. Their place is not in the Copyright Office, and they are not intended to form part of the records of the Copyright Office.

In the face of these provisions, how can the filing of the page proof of material set up for publication either in the form of contributions to a periodical or what is in common parlance recognized as a "book," serve the definite purposes of deposits as prescribed in the Act? It is apparent that if the page proofs are acceptable in the case of contributions to newspapers, they must be acceptable in the case of scientific works, novels, dictionaries, encyclopedias and every other piece of material recognized as books. Can it be con-

ceived that, the obvious purpose of the deposits being clearly established under Sections 13 and 59 to be the enrichment of the Library of Congress, such enrichment is to be effected by placing page proof material on its shelves? In this connection it should be borne in mind that all that Section 12 requires is that two copies of the best edition published at the time of making the deposit meet the requirements of the Act. This means that once a deposit of the material required by the Act has been made in accordance with the terms of the Act no further deposit of subsequent editions can be demanded of the depositor. It follows that if page proof material meets the requirements of the Act, when the book itself is printed and published copies of the completed work cannot be demanded, and consequently cannot be obtained for the purposes set out in Sections 12 and 59. But it is obvious that the deposit of page proof with the Library cannot meet those purposes. Is it to be thought that it was the intention of Congress that page proof material should "be transferred to the permanent collections of the Library of Congress" or "placed in the reserve collections of the Library of Congress for sale or exchange" or that either the Library of Congress or other departmental libraries of the District of Columbia were intended by Section 59 to accept two copies of page proof "for use therein"? How would the occasion for the sale or exchange of such page proof material by the Library of Congress arise? Who would want to buy the page proof of material which in the course of time has crystallized into the completed book available to the public on the market. For what, of value, could such page proof be exchanged? Why would the Library of Congress or any other governmental library desire to have on its shelves the page proof of material, the completed form of which was on the market? It is obvious that one of the purposes of Section 59 was to provide that the Library of Congress should be furnished with the completed book without cost to the Government. The very impermanence and defects of such material, considered from the standpoint of library collections, would obviously defeat the very purposes set out in Section 59 for which deposits are required. If the Act is susceptible of the interpretation that such material must be accepted in the form of deposits, it is plain that the purposes of Section 59 must be definitely defeated.

And in this connection a final reference may be made to the provision in Section 13 that upon the refusal, after request duly made by the Register of Copyrights, of the copyright owner to send in two copies of the best edition, he shall pay to the Library of Congress "twice the amount of the retail price of the best edition of the work." This provision emphasizes the fact that it is expected that two copies of the best edition will be placed at the disposal of the Library of Congress without the expenditure of government money for that purpose. Its intention is obviously to enable the Library to buy two copies of the best edition because the copyright owner has refused to supply them. To construe the words "the best edition" here used as meaning page proof would be simply to ignore the natural and common meaning of the words.

The Federal courts have already taken judicial notice of the fact that the purpose of these deposits is the enrichment of the Library. In the case of Mittenthal, Inc. v. Irving Berlin, Inc., et al (291 Fed. Rep. 714) the court had before it the question as to whether or not the deposit of copyrightable material with the Copyright Office two weeks before publication instead of "promptly after publication" as the statute provides, would affect the copyright. The

court held that it would not, and said inter alia:

"The purpose of the deposit is to secure two copies of 'the best edition' for the Library of Congress as a condition upon the right to protect the copyright.

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"The defendant suggests that the register will be cumbered with publications which may remain unpublished. That must be a slight danger, for a man will seldom deposit copies which he does not publish. But even so, the library is enriched thereby and there need be no confusion, because the register does not issue his certificate till he learns the date of publication."

The above considerations make it clear to the Register's mind that he is without authority to accept for registration material which constitutes page proof of a contemplated publication. But there are other considerations which, if further justification for this interpretation is considered necessary, may be advanced.

Quite aside from the above, the Act contains ample and adequate provision as to the obligations connected with the deposit by an applicant of contributions to newspapers. Section 12 provides that in the case of such contributions where special registration is requested, the application shall be accompanied by ^{in proof} copies of the newspaper in which the contribution is printed. The applicant cannot deny that, as a matter of plain fact, the material that he sends in constitutes the page proof of material which is to serve as a contribution to a newspaper. The Register is informed by the applicant's counsel that this material has actually been reproduced in the newspapers for which it was intended. He has been requested for copies of these newspapers. The fact of collecting these twenty separate sheets, each one bearing the copyright notice as is necessary in connection with the request for special registration in a periodical or newspaper and of binding them between paper covers and calling them a book, cannot change their nature. The Register is perfectly willing, and has so informed the applicant, to register this material once the deposit called for by Section 12 of the Act has been made. But this the applicant refuses to do. He resorts to a device not contemplated by the law and plainly in derogation of its words and spirit. He seeks to change what is simply a collection of separate items of the same newspaper contribution by binding them together and calling them a book. If he is successful in his endeavor, he will establish the principle that it is the duty of the Register, acting in accordance with the words and intention of Congress, to accept for registration books in incomplete and page proof form. The construction which he places upon the law would obviously defeat the fundamental purpose which the system of deposits now serves under the Act and ~~would~~, in the opinion of the Register, defeat the plain intent of the various provisions of the Act to which attention has been called and particularly the intent to enrich the Library of Congress as plainly reflected in Section 59.

The question of the Register's obligation to accept page proof as a deposit is not a new one. On November 3, 1906, the Acting Attorney General addressed a letter to the President in which he stated that "two copies of very indifferent proof sheets stitched together with a cover title, but no regular title page" did not constitute the "copies of such copyright book" as under the preceding Copyright Act had to be placed on file with the Copyright Office in order to secure copyright. Under Section 4956 of the Revised Statutes, the law then in force, the requirements were, as stated by the Attorney General, that "two copies of such copyright book" were to be deposited to have the effect set out above. It will be noted that under the previous law there was no qualification specified in the law, as there is in the present Act, that the books should be "copies of the best edition." Yet in construing the prior law which did not voice this qualification, the Attorney General was of the opinion that the Register of Copyrights was not authorized to register such proof sheets. One result of the opinion was, as is apparent, that the discretion to refuse to register the material lay with the Register of Copyrights. It may be added that under the law in question there was no provision corresponding to Section 10 of the present Act, the effect of which was to prohibit registration by the Register in case the provisions of the Act were not complied with.

In an opinion rendered with respect to the present Act by the Assistant Attorney General (Official Opinions of the Attorney General of the United States, Vol. 28, pp. 557-561) the question of the meaning of the term "a work of art" was one of the issues of the case. He said, *inter alia*:

"Furthermore, the meaning of this expression, and its application to a particular work, does not present a question of law but one of fact, and is not, therefore, one for decision by me. The phrase appears to be a new one in the copyright statutes, and experts would doubtless often differ as to its application; and the register of copyrights must, therefore, when application for registration is made, determine for himself the question whether the work presented is one of art, but in so doing he can not, of course, act arbitrarily and without good reason.

"I therefore answer both questions propounded in the affirmative, provided the painting with reference to which the application is made is 'a work of art'; but whether or not it is such a work is a question for the register of copyrights."

It would seem to follow from the above that it is the view of the Attorney General, as expressed in these cases, that whether registration shall or shall not be made both under the old law and under the present Act, depends upon the discretion of the Register--in the one case, as to whether or not proof sheets of a book constitute the copy of the book required for registration under the old law, and in the other, whether or not an alleged "work of art" is material which can be^{so} registered under the present Act. This, of course, provided that there is a real exercise of discretion and a complete absence of arbitrary action.

If such discretion is vested in the Register under the present Act, it would seem necessarily to follow that the discretion as to whether or not registration should be granted does not lie with the courts. For the above reasons, it is not clear to me that an action for mandamus in the present case would succeed.

This idea occurs to me. The Register has already informed counsel that he is more than willing to register this material if it is presented in such form that it can be registered. In other words, he has been told that a certificate of registration will issue just as soon as we receive the two newspaper copies of the material that the law requires be sent in the circumstances. On what theory could objection be made to this offer? It is true that in this particular case it may be well argued that copyright has already been secured by publication with notice, but as has already been pointed out and is perfectly clear, the question of obtaining copyright by publication with notice is one thing and the question as to whether or not the office can accept a deposit of a certain nature is another. The second does not by any manner of means depend upon the first. Take this case--these people say that this material in page proof was published on such and such a date. They say that because it was so published it must be accepted for registration. We say "No, we cannot accept it for registration because it is not the form in which the law provides that deposits of this kind of material be made. Once you make deposits in that form, we will register the material published and we will give as the date of publication the date on which you state in your application that these books were published." There is nothing that I know of in the law that makes it obligatory on the Register of Copyrights to record as the date of publication the date on which a given deposit was published. That, of course, is the ordinary rule, but take the following case: A publisher publishes for the first time a very cheap edition of the thrilling mystery story entitled "Oh My." Copyright notice and everything else are right there. Everything is all right in that respect. Quick sales are made and he gets out a third edition which, unlike the first cheap edition, is well bound and sells for \$2.50. About that time the Copyright Office awakes to the fact that there is such a book and that no attempt has been made to deposit it with the Copyright Office when it was first published. I write to Messrs. Smith, Smith and Co., publishers, and call their attention to the book and ask for a couple of copies and they send me a couple of cheap copies. I send them right back again and say "No. Under Sec. 13 the office is entitled to the best edition. Send me the best edition." They read Sec. 13 and send the best edition. It is received here together with an application for registration. Will anybody venture to suggest that in giving the date of publication of the work--the date when copyright was secured--that that date will not be the date of the cheap edition? So there, of course, we will have a situation of a deposit which did not bear the date of the recording of the copyright in the register.

Now to revert to Fox Film Corporation. We tell counsel that we refuse to take the material first sent for deposit. He says that the material has fulfilled its function which is its publication in the newspapers. How can he refuse now sending us the newspapers on the basis that their being sent in as deposits will in any way affect his copyright? If the copyright was secured by the publication of the page proof, it was secured and cannot be affected. If it was not secured by publication of the page proof, that situation could not be cured or hurt by the acceptance of the newspaper copies. If he wants a certificate, he knows how he can get it and the recording to be done would be the recording as of the exact date of the securing of the copyright. We do not deny that copyright was secured under the circumstances.

February 21, 1938.

MEMORANDUM TO MR. MOTHERSHEAD

Attention may be called to the fact that it has been the practice of the Copyright Office for a number of years to accept for registration what amounts to the page proof of cartoons which were assembled by syndicates and then sent out in this form to hundreds of newspapers all over the country who from these proofs might select what they wanted for publication. I believe it advisable to mention this at this time because if mention thereto is suddenly made an argument, a complete familiarity with that form of practice coupled with a full and clear appreciation of the difference between the two types of cases, is necessary in order to avoid possible confusion or erroneous impression being created in the mind of the court.

I will deal with the type of material registered under the former practice of the Copyright Office. It is no longer so registered, because over a year ago I refused to accept it. The people asking this registration were the King Features Syndicate. What they sought to do in the case brought to my attention and what they apparently had been doing for years was to assemble on what were obviously proof sheets a large collection of the cartoons with which we have all become familiar through the daily press, such as: "Tillie The Toiler," "Skippy," "Tim Tyler's Luck," etc. These proof sheets were bound together and sent, as above stated, in this form to the newspapers all over the country by the syndicate. They were likewise bound together between covers much as in the case of "In Old Chicago," entitled "King Features Illustrated Weekly." In this form they were sent to this office accompanied, as I recollect, by an affidavit that a sale thereof, or two sales, had been made by some book stall in New York City.

The case on which I took action refusing registration was entitled "King Features Illustrated Weekly, Volume 1." The proof sheets contained some 140 different cartoons. Application was made for the registration of this volume as a book, the application being accompanied by a fee of \$2.00.

Registration was refused on the following grounds:

First, there was no publication within the meaning of the Copyright Act involved in the process of sending these proof sheets to publishers in order that they might look them over and select what would actually appear in the public press. In other words, it was felt here that that process of distribution was not a making available of the material to the public which the law contemplates as essential to publication for the purposes of acquiring copyright protection.

Second, it was felt that the binding of this page proof together and the selling of a copy thereof at a New York book stall, or perhaps two copies, was a colorable publication, the purpose of which became at once plain, and was unhesitatingly admitted to be such purpose by counsel for King Features.

Third, an application fee of \$2.00 is required by the Copyright Act in the case of separate contributions to newspapers, just as in the case of a book. What was sought to be done here was to have the Copyright Office accept and register some 130 different contributions to newspapers, for which application fees in the sum of \$260 should have been paid under the law as the office understood it. Counsel admitted with the utmost frankness and freedom that the only purpose of submitting this material in this form and making the contention of publication in this way was to avoid the purpose of paying \$2.00 per newspaper contribution under the conditions plainly appearing from a reading of Section 12 of the Act.

Fourth, my recollection is that the fact that the material was page proof was not treated as a point of outstanding importance for the purposes of the action taken in the King Features case, because the office was so sure of its points of (A) no publication, (B) colorable publication and (C) complete failure of the applicants to pay the fees required by law that the matter of page proof seems to sink into insignificance.

In the present case of "In Old Chicago" we are not, of course, confronted with the question as to whether providing newspapers with page proof of the various chapters of "In Old Chicago" constituted publication, for the fact is that the applicant for registration in this case sets out very specifically that many copies have been sold or made available to the public, and therefore, this office is not in a strong position to contend that publication was colorable. Here, in a word, the two features which characterize the King Features case are absent; i.e., (A) "publication" by sending proof sheets to editors of newspapers and (B) publication by an obviously colorable sale. But there is a third important feature--perhaps as important as any which arose in the King Features case and is not present here--to wit, that whereas in that case the fundamental purpose of registration was to avoid paying \$2.00 for each separate contribution, that case does not hold here, for the view of the office is that in a continued story like "In Old Chicago" a separate fee of \$2.00 cannot be claimed for each separate chapter.

As opposed to the King Features case, we have the following aspects of the case of "In Old Chicago":

The issue in this case is simple. The applicant claims in effect that he has the right to prepare material for newspaper publication and in the form in which it is prepared for such publication, to wit, in page proof form or a form corresponding in all practical respects thereto, to publish the same with adequate copyright notice, assemble the separate pages of proof together, call the result a book, deposit two copies of the so-called book in the Copyright Office together with the fee required in the case of a book, and that the Register of Copyrights must register the same. Without affirming or denying the legal effect of the publication with notice, insofar as it may or may not result in the securing of copyright by these means, the precise grounds on which registration is rejected are (A) if the publication is a book, it is not acceptable as a book because it is in page proof, and (B) that quite dis-

ting from its inherent fact as page proof, the deposit does not meet with the specific requirement of the Act that it is the newspaper containing the contribution which is required by way of deposit by Section 12 of the Act. A favorite contention first made in this office by counsel for Fox Film was that, admitting it to be page proof, it was none the less the best edition because at the time of the application it was the only edition of the material. This argument has been thoroughly exploded by discovery of the fact that ten days before application was made for the registration of this material, it had been published in newspaper form.

The following facts may be of interest: In December of 1936, application was made by Fox Film Corporation for the registration of a story called "Lloyds of London" by Peter B. Kyne. This was accompanied by deposits of precisely the same nature as accompanied the application in the case of "In Old Chicago." While there were certain defects in the notice in this case to which the attention of counsel for Fox Film had been called, nevertheless registration was refused on the same grounds on which it was refused in the instance of "In Old Chicago." It is believed that the correspondence in this case should be made available to you for reasons which will appear from a perusal of the correspondence itself.

Six months after the refusal of the office to register in the case of "Lloyds of London," there came a similar application from the same source in the case of the "Slave Ship" by Gouverneur Morris which reached the office on May 28. Upon receipt of this application, the Corporation's counsel was informed that the case seemed to be on all fours with that of "Lloyds of London" and the views of counsel on the point requested were never given. Registration was not made and counsel was instructed to bring suit for mandamus at that time. But these instructions were apparently withdrawn. Then six months later came the application for registration of "In Old Chicago."

I understand that the claim is going to be made that this material in "In Old Chicago" does not constitute proof sheets. It may be worth your while to compare it with the material submitted in the case of "Lloyds of London" particularly, and the "Slave Ship." "Lloyds of London" was so obviously uncorrected proof that no one can mistake it. It is for this reason that a comparison of "Lloyds of London" with the "Slave Ship" and "In Old Chicago" may be of interest. The mechanical technique in all three documents appears to be the same.

Register of Copyrights

This is to meet the objection that all the deposits do not enrich the Library in connection with the contention that the purpose of deposits is such enrichment. It is true that not all deposits of written matter received in the Copyright Office are taken over by the Library; that every item deposited does not in fact enrich the Library. Congress, of course, knew this; but, in providing that the deposit should (except in the case of contributions to periodicals) consist of complete copies of the best edition, announced its intention that of all the material the Library might take over, the Librarian should be furnished without cost, two complete copies of the best edition thereof.

The subject matter submitted for registration consists of a proof sheet of original drawings of comic strips by the well-known cartoonist, Walt Disney.

These strips are composed of a series of four or five pictorial illustrations in separate panels each containing explanatory printed matter. Sometimes these illustrations are introduced by an additional panel containing nothing but explanatory text. In each strip one of the panels contains figures representing the month and the day of the month on which, presumably, newspaper publication is to take place. The signature of the artist is on the last picture of each strip. Each strip, as reproduced on the proof sheets, contains the copyright notice "C" (in a circle) 1956 by Walt Disney Enterprises World Rights Reserved.

The original drawings are sent to the King Features Syndicate Inc., under an agreement between the artist and the Syndicate by the terms of which the Syndicate makes up the proofs and submits them to a large number of newspapers to ^{publish or not} accept or reject as the editors may decide. In other words the Syndicate is the agent of the artist for the purposes of

newspaper publication.

It is common knowledge that these comic strips appear daily in hundreds of newspapers in the country. It is common knowledge that they are contributions to these papers just as is other material accepted by the editors from outside sources. But it is contended that they "are not * * * to be regarded as contributions to a periodical as referred to in Section 12 of the Copyright Act, and, as such, to be registered by deposit of a complete copy of the issue of the periodical in which the same appeared."

No suggestion is made on behalf of the applicant as to what the material declared not to be a contribution to the newspaper really is.

It is classified
in the
That is, no attempt has been made to classify this material although its character as a newspaper contribution is denied. *and it is classified as a book in the application* It is, however, said:

"Before they appear in newspapers (periodicals) they are actually published by Walt Disney Enterprises in the form in which the deposit was made. Their subsequent appearance is not an original publication but merely a reprinting."

From the two passages last quoted the following propositions may be deduced:

(A) The material submitted for registration is not a contribution to a periodical.

(B) The offering of this material to several hundred newspapers for newspaper publication is of itself publication.

With respect to proposition (A): The material submitted is a single, large size proof sheet on which there are assembled six proofs of six separate comic strips with a view to their separate newspaper publication on separate and distinct dates. This fact is admitted on all hands. The deposit of proof sheets of material ~~published~~ intended to be published in a periodical or periodicals is an insufficient basis on which to authorize the issuance of a certificate of registration. Where, as here,--and this fact remains uncontested and inescapable--the intention is to publish material in a periodical Section 4 12 of the Act declares in language too plain to require any effort at interpretation, that the deposit shall take the form of "one copy of the issue or issues containing such contribution."

It is not really this sheet of proofs that is sought to be copyrighted. It is the separate comic strips. This fact is apparent from the appearance of the sheet itself. Of itself it constitutes a compilation of illustrative and

Printed matter. As a compilation it calls for a copyright notice containing the word "Copyright" or "Copr.," the year date of publication and the name of the copyright owner. There is no such notice. Conceding the sheet in its essence to be copyrightable, it would not be registerable for fault of the adequate copyright notice. The absence of intention to copyright the sheet as a book is further apparent from the fact that the proof of each separate strip bears its own copyright notice.

The material submitted is not a contribution to a periodical only in the sense that in its present form it does not constitute such contribution because it is a proof, and because it represents an assemblage of the material intended for newspaper publication. That, in this sense, it is not such a contribution in no way supports the argument for registration; for it is the spirit and the mandate of the Copyright Act to accept for registration books or printed material only in the form in which they are submitted to the public.

As to the contention (B) that publication has taken place once the proof sheets have been submitted to the several hundred editors who may or may not publish the cartoons in their newspapers.

It would seem that it would be a pretty sound conclusion of first impression that the receipt of the proofs by the editors would not constitute a publication. I should hesitate to conclude that the page proof of a story or book sent to an editor, or fifty editors, for his or their consideration, and which lacked any or the adequate copyright notice would constitute a dedication through publication of the work in question to the public. But, if we abandon first impressions and turn to the act, the question of Publication seems to be plainly defined and as definitely settled. The "date of publication" says Article 62 "shall, in the case of a work of which copies are reproduced for sale or distribution, be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority * * *

If a typewritten copy of a book intended to be brought to the notice of the public for the first time in printed form is published when sent to one publisher or fifty for him or them to pass on the point whether he will publish it or not, is "the first authorized edition", then the proofs of these comic strips are first authorized editions. The conclusion is ~~is~~ so extreme as to

demonstrate the innate fallacy of the premise. The very use of the word "edition" connotes a going out to the public--not to a group of three, thirty or three hundred men; and the connotation is so exacting that when an "edition" is privately printed it is known as a "private edition." The term "public edition" is rarely if ever used or heard.

The purpose of these cartoons is to amuse the public when published
in the newspapers. The purpose of the proof sheets is to make such diversion
available to the public through the ~~publication in the~~ the medium of publication
in the newspapers. It is not to amuse the editors. These proof sheets are not
sold to or placed on sale with the editors. They are distributed to the editors
in order that they may make their own selections of the material which they
wish to publish. But this distribution is not "publish public distribution."
And it is selling, placing on sale, or publicly distributed copyrightable material
which constitutes publication in the words of the statute.

If the above reasoning is correct, three conclusions follow: (1) the material sought to be copyrighted consists of either (a) the proof sheets or ^(b) the comic strips. If proof sheets, the material is not copyrightable for it has not been published in accordance with the terms of the statute; nor does it bear the proper copyright notice. If ~~the~~ comic strips, ~~if~~ they cannot be registered in their present form. In neither case has the publication required by the Act occurred.

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THREE WAYS OF PUTTING THIS QUESTION

I.

Does the furnishing of copyrightable material constitute a publication thereof when it is furnished to a limited class who may subject such material to a limited use only—its publication in the newspapers—and when the sole purpose of the author in furnishing the limited class with the material in question was its publication through the medium of the press?

II.

Does the furnishing of material with the sole purpose of bringing it to the attention of the public through publication in the newspapers, to a limited class (newspaper owners) who may make of such material only a limited use, to wit, the publication thereof in their newspapers, constitute a publication of such material?

III.

Does the furnishing of a limited number of persons belonging to a limited class (newspaper owners) with material of which they may make a limited use only—the publication of such material through their newspapers—constitute a publication of such material when the avowed purpose of furnishing such material was its publication in the daily press?

Suggestions as to Partial Draft of Answer to
Complaint in the King Features Case

The defendant * * * * *

- ✓ 1. Admits paragraphs 1 to 4.
- ✓ 2. Answering paragraph 5, denies that the copies of Vols. I, II, III, IV and V of "King Features Illustrated Weekly" were published on October 6, 1938, as composite works within the meaning of the Copyright Act, and denies that they constitute composite works within the meaning of the Copyright Act.
- ✓ 3. Answering paragraph 6, denies that on October 6, 1938, the material described entitled "King Features Weekly" was published as, or is a composite work within the meaning of the Copyright Act; and denies that on such date copies thereof were offered for sale or actually sold within the meaning of the Act.
- ✓ 4. Answering paragraph 7, denies that, for the purposes and effects of the Copyright Act, said volumes were on October 7 at any time publicly exhibited, exposed and offered to the public for resale by the purchasers thereof.
5. Answering paragraph 8, admits that, except for the deletions of Section 12 as indicated by the asterisks which appear in that section as quoted by the plaintiff, Section 12 is correctly quoted; but avers that the deletion in the quotation of such section indicated by the asterisks immediately following the clause "Section 15 of this Act;" constitutes on the part of the plaintiff a failure to include in Section 12, as quoted by him, a specific provision of the Copyright Act on which, as the plaintiff has been repeatedly informed by the defendant, refusal to register the material hereinbefore described under the title "King Features Illustrated Weekly" and "King Features Weekly," as registration thereof was applied for by the plaintiff, is based.
6. Answering paragraph 9, admits the contents thereof.
7. Answering paragraph 10, neither admits nor denies that the copies of the material have been produced in compliance with the requirements of Section 15 of the Copyright Act and puts the plaintiff to his proof.
8. Answering paragraph 11, denies that the material deposited in the mail on October 8, 1938, addressed to the Register of Copyrights, Washington, D. C., was deposited pursuant to Section 12 of the Copyright Act; denies that the

material so deposited constituted the "best edition" of the work in question, and denies that it was then published as a composite work within the meaning of the Copyright Act.

9. Answering paragraph 12, denies that on October 8 the plaintiff duly applied for registration of its claims to copyright in said material.
10. Answering paragraph 13, admits that the applications for registration of the material in question were rejected and that the plaintiff was notified of such rejection by Copyright Office letter of October 13, 1938, but avers that in said letter are incorporated by reference Copyright Office letters of February 26, May 12, and May 27, all of 1938, photostatic copies of which letters are annexed hereto and made part hereof and entitled exhibits _____.
11. Answering paragraph 14, denies that the plaintiff, with respect to the material characterized by him as Vols. I, II, III, IV and V of "King Features Illustrated Weekly" and as to the material described by him as a composite work entitled "King Features Weekly," has complied with Sections 9, 12, 18, 19 and 61 of the Copyright Act; and denies that he has complied with the rules and regulations promulgated thereunder in respect to registration of claims of copyright.
12. Answering paragraph 15, denies that the plaintiff is entitled to the registration of the material in question under Section 10 or to obtain certificates of registration under Section 55 of the statute; on the contrary, alleges that the defendant has no authority under the statute to make registration thereof or issue certificate of registration thereon.
13. Answering paragraph 16, denies that in rejecting the applications for registration and in refusing to register and issue certificates of registration thereof, the defendant has acted arbitrarily, unwarrantably or in a manner contrary to the provisions of the copyright laws; and in so denying the defendant

FIRST

quotes the following excerpts from the Copyright Act, and from the Rules and Regulations of the Copyright Office

(a) Section 9:

"That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor * * *."

(b) Section 10:

"That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

(c) Section 12:

"That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published * * * which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution * * * such copies or copy * * * to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

(d) Section 13:

"That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

(e) Section 18:

"That the notice of copyright required by section nine of this act shall consist either of the word 'Copyright' or the abbreviation 'Copr.,' accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication * * *."

(f) Section 19:

"That the notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title-page or the first page of music: Provided, That one notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice."

(g) Section 23:

"That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication * * * Provided * * * [that renewal of such copyright may be acquired under the conditions prescribed in said section] and provided further, That in default of the registration of such application for renewal and extension, copyright in any work shall determine at the expiration of twenty-eight years from first publication."

(h) Section 53:

"That, subject to the approval of the Librarian of Congress, the register of copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this Act."

By authority of Section 53 there have been made the "Rules and Regulations for the Registration of Claims to Copyright," otherwise known as "Copyright Office Bulletin No. 15." At the time of, and long prior to the making of the applications for registrations of claims of copyright in connection with the material entitled "King Features Illustrated Weekly" and "King Features Weekly" in the complaint and the rejection of such applications by the defendant, Rule 39 of such "Rules and Regulations" entitled "Contributions to Periodicals (Form A5)" provided as follows:

"39. If special registration is requested for any contribution to a periodical, one complete copy of the number of the periodical in which the contribution appears should be deposited promptly after publication.

"The entire copy should be sent; sending a mere clipping or page containing the contribution does not comply with the statute." (pp. 16 and 17, Washington Govt. Printing Office, 1927).

Rule 33 of the above "Rules and Regulations" in force and effect as above stated entitled "Application Forms" reads in part as follows:

"33. The Copyright Office has issued the following application forms, which will be furnished on request, and should be used when applying for copyright registration:

"A1. New book printed and published for the first time in the United States; also United States edition of English book.

* * * * *

"A5. Contribution to a newspaper or periodical." (pp. 13 and 14 *ibid*)."

Application forms A1 and A5 are hereto attached and made a part of this answer.

(i) Section 54:

"That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof."

(j) Section 55:

"That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain * * * the date of publication if the work has been reproduced in copies for sale * * *."

(k) Section 59 of the Copyright Act provides

"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

(l) Section 61:

"That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, \$2, which sum is to include a certificate of registration under seal * * *."

(m) Section 62:

"That in the interpretation and construction of this Act 'the date of publication' shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority * * *."

SECOND

Further denying the charge of arbitrary action, the defendant states that the material contained in what the plaintiff designates as "Volumes I, II, III, IV and V of composite work entitled 'King Features Illustrated Weekly'" is a collection of preliminary or proof prints of various well-known comic strips and other matter published both daily and weekly in the newspapers of the United States. This material is printed on separate, unnumbered sheets of paper twenty-four inches in length by eighteen inches in breadth, the printing appearing on one side only of each such sheet of paper. The number of comic strips on the face of each such sheet varies from one or two to six per page. Each such separate comic strip (with two exceptions) contains the copyright notice "Copr. 1938 King Features Syndicate, Inc. World Rights Reserved," or "Copyright, King Features Syndicate, Inc." Each such comic strip contains in figures instructions to newspaper editors or publishers constituting the date on which the material is to be released in the newspapers by such editor or publisher.

Volume I of "King Features Illustrated Weekly" contains 104 such comic strips, each (with one exception) bearing a separate copyright notice and containing release dates as follows:

1. "A Lady's Homework"
2. "A Horse You Can Ride"
3. "People Do Too Much Analyzing"
4. "Knee-High to a Character"
5. "Detour from Rats"
6. "Your Job as a Wife"
7. "Make-Up Your Eyes for Glamor"

In the material sent to the printer in this instance a mistake was made as appears from the last two pages in this compilation. The article "Make-Up Your Eyes for Glamor" is composed of two pages, but before the two pages—that is, the complete contribution—is inserted in this collection the first page only. In other words, we have a duplication here of the first page of this article.

The so-called five volumes of "King Features Illustrated Weekly" and the one volume of "King Features Weekly" are attached hereto and made a part of this answer.

THIRD

Further denying the charge of arbitrary or unauthorized action, the defendant states:

On October 10, 1938, both the applications and material were received in the Copyright Office, the applications being A-1 applications, and the material, registration of claim of copyright in which was sought, being described as composite works. On October 11, 1938, the application and material were examined in the Examining Section of the Copyright Office, duly passed upon and rejection recommended, the reason given by the examiner being that the material in question consisted of "proof copies." In accordance with the practice of the Copyright Office, the file containing the rejections of the above material was submitted to the Chairman of the Revisory Board who concurred in the action recommended. On October 13 the letter of rejection was despatched, and the plaintiff informed that in accordance with action already taken by the Copyright Office in connection with prior applications for registration of similar material and communicated to the plaintiff in its letters of February 26, May 12 and May 27 of 1938, the present applications were rejected. Photo

Because of the information conveyed to the plaintiff in the aforesaid three letters, no memorandum or written record of the findings of fact and

law of the defendant in connection with the rejection of said applications for registration was made; but the conclusions of fact and law reached by the Register in this case were as follows, and are herein set out as answering specifically the charge of arbitrary action made in the complaint:

With respect to the material in question, and with respect to similar material, the defendant, in pursuance of the duties imposed on him by the Copyright Act, found as follows:

(a) That the so-called volume of "King Features Weekly" and the so-called Volumes I, II, III, IV and V of "King Features Illustrated Weekly" constitute an assemblage of written and pictorial matter in the form in which such material is submitted to newspapers by the plaintiff preparatory to and with a view to making it available to the general public in the form of contributions to such newspapers; and not the form in which the material is made available to the general public, in that: the sheets on which the material appears are not numbered—are made of different types and grades of paper—are printed in many instances in newspaper column style—are printed on one side only, and bear in figures the dates on which the material in question is to be released to the public, and that as to the pictorial matter in the nature of comic or other strips noted for release in the Sunday newspaper issues in which such material appears in colors, the proof is, because not colored, incomplete; in that in the case of the "King Features Weekly" the printing is on one side of the sheet only and is accompanied in many instances by specific instructions to the printer how to space and print for newspaper use; and that with the above facts before him, the defendant found that the material constituted proof sheets or an incomplete form or process preliminary to that in which the material was intended to or did actually reach the public.

(b) And the defendant further found that the writings and drawings constitute for the most part material recognizable by any member of the reading public as contributions to the daily and Sunday newspapers—such as, for

instance, "Advice to the Lovelorn" by Beatrice Fairfax; "One Word Led to Another" by Arthur "Bugs" Baer; "This Day in History"; "Clem McCarthy at the Races"; "Popeye" and "Barney Google" cartoons; "Believe It or Not" by Ripley; "Contract Bridge" by Culbertson; "Today's Crossword Puzzle"--and that all the material sought by the plaintiff to be registered as aforesaid was obviously intended for publication as newspaper contributions.

(c) And the defendant further found that some of the material had actually been published in the form of contributions to newspapers each with a separate copyright notice before application for registration had reached the Copyright Office, and a much greater amount of such material had been thus published before action thereon had been taken by the Copyright Office.

(d) The defendant further found that the material submitted consists of proof sheets of at least 423 separate articles or drawings prepared for publication in the form of contributions to the daily and Sunday press, to each of which is attached a copyright notice.

(e) And the defendant further found that the assembling of material in five separate volumes entitled Volumes I, II, III, IV and V of "King Features Illustrated Weekly," each "volume" containing respectively 104, 56, 23, 48 and 82 separate proofs of material intended for publication in the newspapers as contributions thereto and each of said contributions bearing a separate copyright notice, and the assembling in the "volume" entitled "King Features Weekly" 110 proof sheets of material intended for contribution in the newspapers, affixing to each such contribution a separate copyright notice, and the submission of one A-1 application for each such volume and describing each such volume in each such application as a "composite work" constitutes an attempt by the plaintiff to avoid the payment of registration fees required by Section 61 of the Act.

On the above finding of facts the defendant based the following findings of law:

(1) On the authority of Section 10 of the Copyright Act hereinbefore set out in full, the registration of claims of copyright herein involved cannot

be made until full compliance by the applicant with the provisions of the Act "including the deposit of copies."

(2) Copies of the proof sheets of the material submitted for registration in this case do not constitute the "best edition thereof" within the meaning of Section 12 of the Act read in connection with Section 59 thereof.

(3) The copies of proof sheets of the above material prepared for publication as contributions to the daily press, assembled in an attempt to resemble a book, or in any other form are inadequate as deposits to support an application for registration of such contributions, when published with separate copyright notice affixed to each contribution.

(4) Each of the contributions thus assembled as aforesaid and bearing a separate copyright notice as aforesaid, once published is a work subject to copyright and application for registration thereof is made mandatory under Section 12 of the Copyright Act.

(5) The requirement of Section 61 of the Copyright Act that for the registration and issuance of certificate of registration covering each work subject to copyright a fee of \$2 is required, cannot be avoided by the simple process of assembling the proof sheets of 423 such contributions into six separate volumes containing respectively 104, 56, 23, 48, 82 and 110 such contributions, designating each volume a composite work and offering to pay \$12 in fees instead of \$846.

(6) The application form submitted by the plaintiff, to wit, A-1, is the wrong form for contributions to periodicals which require form A-5; one for each contribution.

(7) Merely mechanically assembling a number, large or small, of proof copies of articles or pictorial matter created by different authors each acting independently of the other and calling this collection a composite work does not create a composite work of an author or group of authors within the meaning of the Copyright Act.

And the defendant further states that on October 10, 1938, the date when

applications for the registration of the aforesaid material entitled "King Features Illustrated Weekly" and "King Features Weekly" were received in the Copyright Office, no less than 85 of the 423 articles contained in the material submitted by the plaintiff as aforesaid had already been published in the daily press and that of this number at least 17 had been published without copyright notice and had thereby entered the public domain.

And the defendant further states that on and by the 13th of October, 1938, the date on which the action taken by the Copyright Office rejecting the applications for registration in question was communicated to the plaintiff, no less than 213 had appeared in the public press, 57 of which were published without copyright notice and had thereby entered the public domain.

And the defendant further says that he verily believes that all the material contained in the so-called volumes of "King Features Illustrated Weekly" and "King Features Weekly" has long since been reproduced in the public press as contributions thereto.

And the defendant further states that after careful examination of the aforesaid material submitted for registration by the plaintiff and the documents submitted and attached to the complaint in support of the contention of the plaintiff that the material in question was published on October 6 within the meaning of the Copyright Act, such alleged publication was spurious and colorable and effected for no purpose other than to avoid the payment of copyright fees required by Section 61 of the Act.

The defendant denies that the above findings of fact and law made by him, as set out in this answer, and his action based upon such findings were arbitrary but, on the contrary, asserts that such findings either of law or fact were both reasonable and not lacking in justification.

CLB:GC

SLBK 34, p. 176.

✓ King Feature
See MOCK & BLUM file.

⑨

January 22, 1937.

Gentlemen:

Receipt is acknowledged of an application on form A1 on behalf of King Features Syndicate of a document described as a book entitled "King Features Illustrated Weekly, Vol. 1." Receipt is further acknowledged of two copies of an affidavit by one Morris Kletter setting out that two copies of the volume in question were purchased by him from King Features and that of these two, one volume has been sold by Mr. Kletter under conditions where the public has been enabled to purchase without any restriction of any kind.

It is not perceived how the conditions under which King Features sold these proofs, or Mr. Kletter bought or sold them, are relevant to the question of their registration.

The material which you submit for registration appears to be a bound collection of a large number of proofs of cartoons commonly known as newspaper comic strips, such as appear in the daily press and which, in their essence, constitute now, and have for years past been regarded as constituting, contributions to such newspapers. The deposit required by the Copyright Act in the case of material of this kind is "one copy of the issue or issues containing such contribution" (Section 12).

The Copyright Office would gladly appreciate a reference to any provision of the Act which you may feel justifies the registration of the special type of material covered by your application, upon deposits of the character which you have submitted.

Sincerely yours,

C. L. Bouvé
Register of Copyrights

Messrs. Mawhinney & Mawhinney,
Munsey Building,
Washington, D. C.

CLB:CC
5-12-38
SLB 35, p. 296
FO

Attention: Alfred H. Wasserstrom, Esq.

Dear Sir:

Receipt is acknowledged of your letters of May 2 and 7, 1938, enclosing applications for the registration of five volumes of "King Features Illustrated Weekly" for April and five volumes of the same title for May.

This material corresponds in all respects to the five volumes of the "King Features Illustrated Weekly," registration for which was requested in your letter to this office of February 23, 1938. In my letter of February 26, 1938, sent in reply to yours of February 23, 1938, you were informed that registration thereof could not, in the opinion of the office, be made, and the reasons setting out the grounds of this action were discussed in great detail in that letter. As pointed out in that communication, the action then taken was confirmatory of and consistent with the action taken by this office in 1937 in connection with your application for the registration of material entitled "King Features Illustrated Weekly, Volume 1."

For the reasons brought to your attention by this office, both in the course of correspondence and of conferences held in this office in 1937, and in my letter to you of February 26, and with which, consequently, you are fully familiar, registration of this material must again be denied. However, I find enclosed with your letter of May 7 not only five applications for material of the type above described, but an application form A-7 requesting the registration of what you designate as a book and entitle "King Features Weekly," and further describe in the application as a "composite work." Two copies of this material are enclosed as deposits to support this A-7 application. This compilation of material has been carefully examined and found to contain the following writings by well-known newspaper columnists:

<u>Author</u>	<u>No. of Articles</u>	<u>Title</u>
Arthur "Bugs" Baer	1	"Biographies of a Bug"
" " "	6	"One Word Led to Another"
Jo Paquin	6	"What's the Answer?"
Helen Rowland	2	"The Merry-go-round"
Axel Storm	1	"Broadway Nights"
Edwin C. Hill	6	"The Human Side of the News"
Mrs. Cornelius Beeckman	7	"Good Manners"
Helen Jameson	7	"Beauty"
Alice Alden	3	"Fashion Flashes"
No author	1	"This Day in History"
Beatrice Fairfax	4	"Advice to the Lovelorn"

<u>Author</u>	<u>No. of Articles</u>	<u>Title</u>
Elsie Robinson	5	"Listen, World"
" "	1	(title and 1st page missing)
Sabina Connelly	6	"What Do you Know?"
Alice Hughes	7	"A Woman's New York"
Ida Jean Kain	6	"Your Figure, Madame"
Dan Parker	3	"I'm Telling You"
Not given	6	"Clem McCarthy at the Races"
Erskine Johnson	7	"Behind the Make-up"
Frances Drake	7	"Your Individual Horoscope"
Dr. Herman N. Bundesen	6	"Dr. Bundesen's Daily Health Column"
Alma Archer	1	"New-Fangled Marriage"
" "	1	"A One-Way Ticket to a Wheel Chair"
" "	1	"Sex Appeal on the Payroll"
" "	1	"How to be a Bride"
" "	1	"Bathtubs for Job Hunts"
" "	1	"A Lot of Horse"
" "	1	"Sun Spots for Summer"
Clark Kinnaird	5	"Today is the Day"
Jack Cluett	6	"Don't be Too Sure"
	<u>116</u>	

In this entire collection as they are bound together there are 116 different articles, each one obviously intended to serve its true function as a contribution to a newspaper. In the articles entitled "Dr. Bundesen's Daily Health Column" there are to be found instructions as to the type to be used at certain points when the article is made available to the public in the newspaper in which it is to appear or has already appeared. This is repeated in the articles by Ida Jean Kain; as examples, "Black Face"; "End Black Face"; "(1 col. caption)." Also in "Listen, World" by Elsie Robinson: "(Begin Italics)"; "(End Italics)"; "(Pick up or reset the following standing box)"; "(No Space)".

The form in which this collection appears is not page proof, as is the case with the other "King Features Illustrated Weekly" collections characterized by a volume number; for the material in question appears to be mimeographed or other similar process.

As has so many times been brought to your attention in the course of conferences and communications on this subject, registration cannot be effected by the Register of Copyrights unless the applicant for registration has complied with the provisions of the Act. As stated in the Report to accompany H.R. 28192,

"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the register of copyrights can issue to the claimant a certificate of registration."

What you are sending for registration is a selected assortment of separate articles written for the sole purpose of fulfilling their function of being made available to the public by publication as contributions to newspapers. Contributions to newspapers are, in a general sense, under the Copyright Act books and, as published books, the registration fee is set, under Section 61, at \$2.00.

Section 12 of the Copyright Act draws a sharp distinction, for the purposes of the nature of the deposit to be made in the Copyright Office, between books and contributions to newspapers for which special registration is requested. Each one of the 116 separate articles, fastened together and sent to the Copyright Office with the request that they be registered as a composite work, has a separate and distinct copyright notice; this obviously because of the purpose to publish each one of these separate contributions separately in a given issue of a newspaper or newspapers and to protect it as such separate publication by a separate copyright notice without which copyright protection could not exist. In view of the provisions of Section 12 of the Act, the publication of such separate contribution with such special copyright notice is tantamount to information to the public that special registration has been requested. To file an application for registration of a contribution to a newspaper after publication with such copyright notice constitutes a request for special registration within the meaning of that language as used in Section 12 read in connection with the requirements of that Section as to the nature of the deposit which must support the application. Section 12 specifically requires that a copy of the newspaper in which a given contribution is published is the form of deposit, and the only form which will justify registration.

Your application for the registration of this material must be denied for the following reasons:

You make application for this assembled material under the name of a "composite work." Where the law requires a deposit of a certain type for material of a certain type, such as this—contributions to newspapers—and requires that a separate fee shall be provided for each such writing, I must confess myself unable to see how these specific provisions can be avoided by the simple process of collecting together a number of separate articles really intended to be made available to the public generally for the first time as separate publications.

As I understand the situation, you are requesting me, as Register of Copyrights, to register 116 different writings for \$2.00 instead of requiring what the law certainly, it seems to me, imperatively requires before registration, to wit, a fee of \$232.

You are requesting me to accept as a deposit in connection with the application for registration of copyright in this material, a deposit which I have no authority to accept, as I read the law.

Mr. Wasserstrom informed me on the occasion of our last conference in this office, that the publication of this material in the newspapers took place within a week following the so-called publication thereof in the form in which it is deposited here on these applications for registration. This fact is established by the contents of this material, by the item entitled "This Day in History" which covers separate events occurring on separate dates running May 9, 10, 11, 12, 13 and 14; as well as in the articles by Clark Kinnaird covering, in like manner, the dates May 10 to 15, inclusive.

To judge from its appearance, this material is simply preliminary copy which is sent by the King Features Syndicate to their various newspaper connections for publication in the press. It may be this act which was described as publication in the application for registration. If this is the case, I would entertain grave doubts as to such act constituting the publication expressed by the statute. But admitting arguendo that such an act did constitute publication, I must again emphasize the fact that the securing of copyright by publication, or the failure thus to secure it, is a question entirely apart and distinct from the duties of the Register with respect to the acceptance of material deposited in connection with the registration of claim of copyright.

Undoubtedly many of these articles have already appeared in the daily press. Doubtless the rest of this collection of 116 articles will have appeared in the press within a few days.

If your client will file with the Copyright Office one copy of the issue or issues of the newspapers in which these contributions, when published, appear, registration will be promptly made. Until such time, registration must be, and is, denied because of the failure of the King Features Syndicate to meet those conditions of registration the existence of which is essential to the performance of my duties regarding registration as those duties seem clearly set out to me in the terms of the statute.

Sincerely yours,

Register of Copyrights

Manheim Rosenzweig, Esq.,
959 Eighth Avenue,
New York, New York.

Attention: Alfred H. Wasserstrom, Esq.

Dear Sir:

Receipt is acknowledged of your letter of May 21 enclosing applications for copyright registration of the volumes entitled "King Features Illustrated Weekly," I, II, III, IV and V, first published May 19, 1938, together with application for registration of "King Features Weekly" first published May 19, 1938. Receipt of the material is also acknowledged.

These applications are rejected for the reasons set out in my letters to you of January 22, February 26, and May 12, 1938.

I cannot see the application of the statement on page three of your letter: "Your right to make rules and regulations with the approval of the Librarian 'does not confer upon the Register any judicial functions.'"

There is no question involved in the issue between us as to the right of the Register to make rules and regulations. I am acting in accordance with my interpretation of Section 10 of the Act which House of Representatives Report 2222 to accompany H.R. 28192, cited in your letter, interprets in the following language:

"Section 10 explains the method of obtaining registration of a claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration." (p. 10)

You state that you realize the issue obtaining between us. To my mind, that issue is clear cut and is expressed in the three following propositions:

(1) I cannot accept page proof because, for the reasons set out in such detail to you in prior correspondence, page proof material of a writing does not constitute the best edition thereof.

(2) I cannot register more than one claim to copyright for the fee which the law provides shall be paid for one such claim only.

(3) I cannot accept by way of deposit and, consequently, cannot register material which constitutes contributions to periodicals except on the receipt of the deposit which Section 12 provides shall be made when registration for such contributions is requested.

(4) The mere assembling of page proof of contributions to newspapers, and applying for registration thereof as a book, cannot make such an accumulation of material a book for the purposes of the deposit required by Section 12 of the Act.

If you will turn to pages 58 and 59 of 226 U. S., you will find, I believe, more than ample authority to support the proposition in paragraph 4 supra.

Sincerely yours,

Register of Copyrights

Manheim Rosenzweig, Esq.,
959 Eighth Avenue,
New York, New York.

GC

SLB 35, p. 193

FI

February 26, 1938.

Attention: Alfred H. Wasserstrom, Esq.
SLBK 34 P 263

Dear Mr. Wasserstrom:

Receipt is acknowledged of your letter of February 23, 1938, re your application for registration of material contained in the following volumes:

King Features Illustrated Weekly Volume I
King Features Illustrated Weekly Volume II
King Features Illustrated Weekly Volume III
King Features Illustrated Weekly Volume IV
King Features Illustrated Weekly Volume V

This material seems to be identical in nature with the material entitled "King Features Illustrated Weekly Volume I," application for registration of which was made last year and refused by this office.

Your letter seems to be devoted exclusively to pointing out the fact that publication of this material in the form in which it is deposited in this office has taken place. This point was also urged with respect to the material identical in nature for which registration was refused last year. In this connection, permit me to quote from my letter to you of January 22, 1937.

"It is not perceived how the conditions under which King Features sold these proofs, or Mr. Kletter bought or sold them, are relevant to the question of their registration.

"The material which you submit for registration appears to be a bound collection of a large number of proofs of cartoons commonly known as newspaper comic strips, such as appear in the daily press and which, in their essence, constitute now, and have for years past been regarded as constituting, contributions to such newspapers. The deposit required by the Copyright Act in the case of material of this kind is 'one copy of the issue or issues containing such contribution' (Section 12)."

I also quote from my letter of February 4, 1937, with which you are doubtless familiar, addressed to your representatives in Washington, Messrs. Mawhinney & Mawhinney:

"(1) Can material created for one purpose only, used in the past for that purpose and to be used in the future for that purpose, to wit, sale and distribution to the public in the

form of contributions to newspapers, change its nature as such material as the outcome of the process of causing separate proofs thereof to be assembled, bound between covers, and the result labeled a 'book'?

"(2) Can the requirement of Section 12 of the Copyright Act that in the case of contributions to periodicals there shall be deposited with the Copyright Office 'one copy of the issue or issues containing such contributions' be avoided by collecting 135 proofs of such contemplated contributions, binding them together, and offering the result to the Copyright Office as a substitute for the type of deposit specifically described as essential in the Section in question?

"(3) Can the requirement of Section 61 of the Copyright Act that a fee of \$2.00 is payable for the registration of 'any work subject to copyright' except certain material which does not include contributions to periodicals, be avoided by assembling the proofs of 135 'works subject to copyright,' each one of which bears a copyright notice, and submitting them to this Office for registration with a check of \$2.00 instead of \$270.00?"

Aside from the assertions contained in your letter of the 23rd with respect to the publication of the material involved, you state inter alia: "We submit the Register is without authority to pass upon the question of whether copyright has been secured in and to a work."

The Register does not purport to exercise any such power in connection with action taken upon the registration of this material. You further state: "The Register has neither the power nor the machinery for the investigation of the validity of claims to copyright."

The validity of the claim of copyright to the material submitted for registration has not been and is not raised by the Register in connection with this application for registration.

I have no hesitation in asserting, however, that it is not only the power but the duty of the Register to make registration under the conditions, and under such conditions only, prescribed by the statute. Those conditions are set out in Sections 10 and 54 of the Copyright Act which I quote as follows:

"Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this

Act, including the deposit of copies, and upon such compliance, the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

"Sec. 54. That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof."

Section 12 of the Act provides that where the material, application for registration of which is made to the Copyright Office, consists of a contribution to a periodical, such application shall be accompanied by one copy of the issue or issues of the newspaper in which such contribution is published. Section 12 also provides that where application is made for registration of material in the form of a book, the deposit shall consist of two complete copies of the best edition thereof.

Section 61 provides

"That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, \$2, which sum is to include a certificate of registration under seal."

-4-

For purposes of classification under the Copyright Act, a contribution to a newspaper is regarded as a book and registration thereof calls for the payment of the sum of \$2.00 by way of statutory fee.

The material for the registration of which you apply consists of paper-bound volumes each containing a certain number of cartoons or comic strips in page proof. Many of these comic strips are well known to the public of the United States, as well as to the public beyond its borders, by virtue of their constant appearance in the public press. Were the normal course of registration--that course specifically laid down in Section 12--to be followed, an application for registration of one or more of these contributions would be accompanied by the deposit of the issue or issues of the newspaper in which it appeared, accompanied by the fee of \$2.00 for each registration. But that is not the course which is followed here. Your client seeks what, in my opinion, is a course not prescribed by the Act and which runs directly counter to the provisions of Section 12, which I have quoted. He causes between one hundred and two hundred page proof productions of separate contributions to be assembled in one volume, sends them thus assembled to the Copyright Office and requests that they be registered for the sum of \$2.00. In a word, I am requested to register for \$2.00 material for which, by a specific provision of the Act, I am directed to accept as many times \$2.00 as there are separate newspaper contributions in the particular volume. I feel that I cannot do that without ignoring the instructions of Congress as revealed in the Act.

But your client contends that this material assembled together and bound in paper covers constitutes a book--a single publication. He points out that the book thus constructed has been placed on sale and sold to the public; that to that volume is attached the adequate copyright notice, and that the deposit of two copies of this volume, together with an application for its registration as a book correctly filled out as to books and accompanied by a fee of \$2.00, makes it obligatory upon the Register to register the same. In other words, he seeks to avoid the requirements of Section 12 and Section 51 by a process which to my mind the statute does not mean shall be employed and with results which, if registration were made, the framers of the Act certainly did not have in mind. For I cannot believe that Congress, in providing that there should be paid into the Copyright Office a fee of \$2.00 for the registration of, and issuance of certificate of registration in connection with, a contribution to a newspaper, meant that the payment of such fees could be avoided by the employment of an obvious expedient no matter how acceptable from the standpoint of the applicant. It follows that I do not feel myself in a position to make such registration, application for which is accompanied by a fee of \$2.00 only; for in my opinion, the law requires that the Government of the United States, through the Copyright Office, shall receive a far greater amount.

I understood from you this morning in conversation that the contents of this material appear in the newspapers for publication for which they are prepared within a week of the date on which such material is sold to the public in the form of collections of page proof bound in a separate

volume. Such publication constitutes a daily manifestation to the public of the United States of the fulfillment of the true function of this page proof material; and its prompt appearance in the newspapers is the best evidence of the basic purpose it is to serve. I have no doubt that you will agree with me that the production of this material in this form is accomplished for the sole purpose of facilitating its reproduction in the newspapers in which these comic strips appear; in other words, that this page proof material constitutes in this case, as does any other page proof, an intermediate step in the production of newspaper-making or bookmaking. But Section 12, by necessary implication as well as by direct terms, reflects the intention of Congress that the form in which deposits of material such as this is to be accepted by the Copyright Office, is a form which, taking into consideration the method of publication, shall be complete, that is, shall be in the form of the actual newspaper itself when made available to the public. To collect these page proofs and bind them in a paper cover cannot, in my opinion, change their inherent nature—stop them from being what they are and what they are intended to be, to wit, contributions to periodicals. In my opinion, I cannot accept them as deposits for registration for the simple reason that in Section 12 Congress specifically provides that such deposits shall take a different form.

But let me accept, for the sake of argument, your contention that they constitute books and are not really contributions to periodicals because at the time you sent this material in the newspapers in which they appear have not been published. You state that they are acceptable as deposits as books because, you say, they are two complete copies of the best edition of the material contained therein; and the basis for contending that they are the best edition is predicated on the proposition that, being the only matter published, they must constitute the best edition of such matter published at the time of making application. The contention amounts to this: That when Congress provided in Section 12 of the Copyright Act that the deposits should consist of two complete copies of the best edition, this statement meant, in effect, that there should be acceptable as deposits two complete copies of page proof. It seems to me that this contention is untenable even were I to depend for my conclusion upon an interpretation of the phrase "two complete copies of the best edition" alone. But it is my duty, as I see it, to take into consideration not only Section 12, but Section 12 read in the light of other applicable provisions of the Act.

As you are well aware, the preceding Copyright Act required the deposit of two copies of the "copyright work" in order to enable the person seeking copyright to secure the copyright of a book. The present law has no such provision. Copyright is secured by the simple act of publication with the notice. Under the present Act the securing of copyright is one thing, registration of the claim of copyright another, and the performance of conditions precedent to registration is, once again, a thing separate and apart from each of the other two. In other words, there must be some reason for the insistence in the Act upon deposit in the form required by the Act under Section 12.

Those reasons are to be found in that provision of Section 13 which provides that in the case of refusal on the part of a person who has secured copyright to make the deposit required by the Act after demand is made upon him by the Register of Copyrights to do so, he shall pay a fine of \$100, lose his copyright and pay to the Librarian of Congress the retail price of two copies of the best edition of the work; and particularly in Section 59 of the Act. That Section reads as follows:

"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

If deposits made in page proof of a book are to be accepted by the Register of Copyrights by way of deposit, it is obvious that the function which those deposits are intended to fulfill as defined in Section 59 could not be exercised. Page proof, instead of complete copies of the best edition of the works of authors, would take the place of those complete copies of the best edition which, by virtue of the Copyright Act, day by day increase the volume of literary works in the permanent collections of the Library of Congress; the Librarian would find himself balked in an effort to "sell or exchange" page proof copies of material which by the time such sale or exchange was attempted, had long since made its appearance in marketable editions available to the public; the Government of the United States would be forced to buy for the Library of Congress in the public market such books as it was deemed necessary to acquire for the purpose of maintaining or adding to such permanent collections--and this in the face of the provision of Section 13, to which I have alluded above, the manifest purpose of which is to provide that the Library of Congress shall be enriched by "two complete copies of the best edition" without cost to the people of the United States.

For the reason that, as I see it, the acceptance of page proof material of books as deposits instead of books themselves would run counter to the very purposes for which such deposits are demanded on pain of great embarrassment, if not the actual loss of the copyright to the copyright owner, I feel it my duty to refuse to accept deposits in the form of page proof material.

Let me again emphasize that my action in this case is taken without reference whatsoever to the question as to whether the material which you submit for registration has been published or whether you have secured a copyright therein. The sole questions involved in this case turn upon

my construction of what my powers and duties are in connection with the matter of registration of claims of copyright. That I must judge for myself. No member of the public can act for me in this respect.

As I interpret the Act and the facts surrounding this situation, the material, registration for which you request, constitutes in fact contributions to periodicals, and constitutes in fact and substance page proof of such contributions. If you see fit to file with the Copyright Office one copy of the issue or issues of the newspapers or periodicals in which these comic strips appear, accompanied by the fee specified by the Act, registration will be promptly made. I have written you in the above detail because your letter of February 23 seems to indicate that at the time it was written there was no mutual understanding between us as to the issues involved.

Respectfully,

Register of Copyrights

Manheim Rosenzweig, Esq.,
Two Columbus Circle,
New York, New York.

P. S. On page 4 of this letter I have emphasized the fact that the contents of the volumes which you submit for registration contain proofs of comic strips. I do not mean to imply that that is all these volumes contain, for they constitute also a very material part of proofs of featured newspaper articles of widely varied description.

(A)

Defendant avers that he
refused to register the said
claim of copyright for the reason
the deposits submitted in support of
the registration of such claim were
not in the form required ~~in the case~~
by section 12 of the Act, Copyright
Act, in that, ^{being proof,} they do not constitute complete
copies of the best edition, and are so
not consist of the issues of the newspaper
~~in which they~~ containing the same

Enclose copy of letter
of 24th inst. to representative
of King Features
who have again applied for
registration of identical King
Features material exemplified by
the copy of the King Features
Weekly brought for herewith
They express the intention of bringing
an action for mandamus in
case of refusal to register

C. J. B.

February 26, 1938.

Attention: Alfred H. Wasserstrom, Esq.
SLBK 34 P 263

Dear Mr. Wasserstrom:

Receipt is acknowledged of your letter of February 23, 1938, re your application for registration of material contained in the following volumes:

King Features Illustrated Weekly Volume I
King Features Illustrated Weekly Volume II
King Features Illustrated Weekly Volume III
King Features Illustrated Weekly Volume IV
King Features Illustrated Weekly Volume V

This material seems to be identical in nature with the material entitled "King Features Illustrated Weekly Volume I," application for registration of which was made last year and refused by this office.

Your letter seems to be devoted exclusively to pointing out the fact that publication of this material in the form in which it is deposited in this office has taken place. This point was also urged with respect to the material identical in nature for which registration was refused last year. In this connection, permit me to quote from my letter to you of January 22, 1937.

"It is not perceived how the conditions under which King Features sold these proofs, or Mr. Kletter bought or sold them, are relevant to the question of their registration.

"The material which you submit for registration appears to be a bound collection of a large number of proofs of cartoons commonly known as newspaper comic strips, such as appear in the daily press and which, in their essence, constitute now, and have for years past been regarded as constituting, contributions to such newspapers. The deposit required by the Copyright Act in the case of material of this kind is 'one copy of the issue or issues containing such contribution' (Section 12)."

I also quote from my letter of February 4, 1937, with which you are doubtless familiar, addressed to your representatives in Washington, Messrs. Mahinney & Mahinney:

"(1) Can material created for one purpose only, used in the past for that purpose and to be used in the future for that purpose, to wit, sale and distribution to the public in the

form of contributions to newspapers, change its nature as such material as the outcome of the process of causing separate proofs thereof to be assembled, bound between covers, and the result labeled a 'book'?

"(2) Can the requirement of Section 12 of the Copyright Act that in the case of contributions to periodicals there shall be deposited with the Copyright Office 'one copy of the issue or issues containing such contributions' be avoided by collecting 135 proofs of such contemplated contributions, binding them together, and offering the result to the Copyright Office as a substitute for the type of deposit specifically described as essential in the Section in question?

"(3) Can the requirement of Section 61 of the Copyright Act that a fee of \$2.00 is payable for the registration of 'any work subject to copyright' except certain material which does not include contributions to periodicals, be avoided by assembling the proofs of 135 'works subject to copyright,' each one of which bears a copyright notice, and submitting them to this Office for registration with a check of \$2.00 instead of \$270.00?"

Aside from the assertions contained in your letter of the 23rd with respect to the publication of the material involved, you state inter alia: "We submit the Register is without authority to pass upon the question of whether copyright has been secured in and to a work."

The Register does not purport to exercise any such power in connection with action taken upon the registration of this material. You further state: "The Register has neither the power nor the machinery for the investigation of the validity of claims to copyright."

The validity of the claim of copyright to the material submitted for registration has not been and is not raised by the Register in connection with this application for registration.

I have no hesitation in asserting, however, that it is not only the power but the duty of the Register to make registration under the conditions, and under such conditions only, prescribed by the statute. Those conditions are set out in Sections 10 and 55 of the Copyright Act which I quote as follows:

"Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this

Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

"Sec. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of the fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration."

Section 12 of the Act provides that where the material, application for registration of which is made to the Copyright Office, consists of a contribution to a periodical, such application shall be accompanied by one copy of the issue or issues of the newspaper in which such contribution is published. Section 12 also provides that where application is made for registration of material in the form of a book, the deposit shall consist of two complete copies of the best edition thereof.

Section 61 provides

"That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, \$2, which sum is to include a certificate of registration under seal."

-4-

For purposes of classification under the Copyright Act, a contribution to a newspaper is regarded as a book and registration thereof calls for the payment of the sum of \$2.00 by way of statutory fee.

The material for the registration of which you apply consists of paper-bound volumes each containing a certain number of cartoons or comic strips in page proof. Many of these comic strips are well known to the public of the United States, as well as to the public beyond its borders, by virtue of their constant appearance in the public press. Were the normal course of registration--that course specifically laid down in Section 12--to be followed, an application for registration of one or more of these contributions would be accompanied by the deposit of the issue or issues of the newspaper in which it appeared, accompanied by the fee of \$2.00 for each registration. But that is not the course which is followed here. Your client seeks what, in my opinion, is a course not prescribed by the Act and which runs directly counter to the provisions of Section 12, which I have quoted. He causes between one hundred and two hundred page proof productions of separate contributions to be assembled in one volume, sends them thus assembled to the Copyright Office and requests that they be registered for the sum of \$2.00. In a word, I am requested to register for \$2.00 material for which, by a specific provision of the Act, I am directed to accept as many times \$2.00 as there are separate newspaper contributions in the particular volume. I feel that I cannot do that without ignoring the instructions of Congress as revealed in the Act.

But your client contends that this material assembled together and bound in paper covers constitutes a book--a single publication. He points out that the book thus constructed has been placed on sale and sold to the public; that to that volume is attached the adequate copyright notice, and that the deposit of two copies of this volume, together with an application for its registration as a book correctly filled out as to books and accompanied by a fee of \$2.00, makes it obligatory upon the Register to register the same. In other words, he seeks to avoid the requirements of Section 12 and Section 51 by a process which to my mind the statute does not mean shall be employed and with results which, if registration were made, the framers of the Act certainly did not have in mind. For I cannot believe that Congress, in providing that there should be paid into the Copyright Office a fee of \$2.00 for the registration of, and issuance of certificate of registration in connection with, a contribution to a newspaper, meant that the payment of such fees could be avoided by the employment of a transparent device no matter how acceptable from the standpoint of the applicant. It follows that I do not feel myself in a position to make such registration, application for which is accompanied by a fee of \$2.00 only, but in my opinion, the law requires that the Government of the United States, through the Copyright Office, shall receive a far greater amount.

I understood from you this morning in conversation that the contents of this material appear in the newspapers for publication for which they are prepared within a week of the date on which such material is sold to the public in the form of collections of page proof bound in a separate

volume. Such publication constitutes a daily manifestation to the public of the United States of the fulfillment of the true function of this page proof material; and its prompt appearance in the newspapers is the best evidence of the basic purpose it is to serve. I have no doubt that you will agree with me that the production of this material in this form is accomplished for the sole purpose of facilitating its reproduction in the newspapers in which these comic strips appear; in other words, that this page proof material constitutes in this case, as does any other page proof, an intermediate step in the production of newspaper-making or bookmaking. But Section 12, by necessary implication as well as by direct terms, reflects the intention of Congress that the form in which deposits of material such as this is to be accepted by the Copyright Office, is a form which, taking into consideration the method of publication, shall be complete, that is, shall be in the form of the actual newspaper itself when made available to the public. To collect these page proofs and bind them in a paper cover cannot, in my opinion, change their inherent nature—stop them from being what they are and ~~for~~ what they are intended to be, to wit, contributions to periodicals. In my opinion, I cannot accept them as deposits for registration for the simple reason that in Section 12 Congress specifically provides that such deposits shall take a different form.

But let me accept, for the sake of argument, your contention that they constitute books and are not really contributions to periodicals because at the time you sent this material in the newspapers in which they appear have not been published. You state that they are acceptable as deposits as books because, you say, they are two complete copies of the best edition of the material contained therein; and the basis for contending that they are the best edition is predicated on the proposition that, being the only matter published, they must constitute the best edition of such matter published at the time of making application. The contention amounts to this: That when Congress provided in Section 12 of the Copyright Act that the deposits should consist of two complete copies of the best edition, this statement meant, in effect, that there should be acceptable as deposits two complete copies of page proof. It seems to me that this contention is untenable even were I to depend for my conclusion upon an interpretation of the phrase "two complete copies of the best edition" alone. But it is my duty, as I see it, to take into consideration not only Section 12, but Section 12 read in the light of other applicable provisions of the Act.

As you are well aware, the preceding Copyright Act required the deposit of two copies of the "copyright work" in order to enable the person seeking copyright to secure the copyright of a book. The present law has no such provision. Copyright is secured by the simple act of publication with the notice. Under the present Act the securing of copyright is one thing, registration of the claim of copyright another, and the performance of conditions precedent to registration is, once again, a thing separate and apart from each of the other two. In other words, there must be some reason for the insistence in the Act upon deposit in the form required by the Act under Section 12.

Those reasons are to be found in that provision of Section 13 which provides that in the case of refusal on the part of a person who has secured copyright to make the deposit required by the Act after demand is made upon him by the Register of Copyrights to do so, he shall pay a fine of \$100, lose his copyright and pay to the Librarian of Congress the retail price of two copies of the best edition of the work; and particularly in Section 59 of the Act. That Section reads as follows:

"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

If deposits made in page proof of a book are to be accepted by the Register of Copyrights by way of deposit, it is obvious that the function which these deposits are intended to fulfill as defined in Section 59 could not be exercised. Page proof, instead of complete copies of the best edition of the works of authors, would take the place of those complete copies of the best edition which, by virtue of the Copyright Act, day by day increase the volume of literary works in the permanent collections of the Library of Congress; the Librarian would find himself balked in an effort to "sell or exchange" page proof copies of material which by the time such sale or exchange was attempted, had long since made its appearance in marketable editions available to the public; the Government of the United States would be forced to buy for the Library of Congress in the public market such books as it was deemed necessary to acquire for the purpose of maintaining or adding to such permanent collections--and this in the face of the provision of Section 13, to which I have alluded above, the manifest purpose of which is to provide that the Library of Congress shall be enriched by "two complete copies of the best edition" without cost to the people of the United States.

For the reason that, as I see it, the acceptance of page proof material of books as deposits instead of books themselves would run counter to the very purposes for which such deposits are demanded on pain of great embarrassment, if not the actual loss of the copyright to the copyright owner, I feel it my duty to refuse to accept deposits in the form of page proof material.

Let me again emphasize that my action in this case is taken without reference whatsoever to the question as to whether the material which you submit for registration has been published or whether you have secured a copyright therein. The sole questions involved in this case turn upon

my construction of what my powers and duties are in connection with the matter of registration of claims of copyright. That I must judge for myself. No member of the public can act for me in this respect.

As I interpret the Act and the facts surrounding this situation, the material, registration for which you request, constitutes in fact contributions to periodicals, and constitutes in fact and substance page proof of such contributions. If you see fit to file with the Copyright Office one copy of the issue or issues of the newspapers or periodicals in which these comic strips appear, accompanied by the fee specified by the Act, registration will be promptly made. I have written you in the above detail because your letter of February 23 seems to indicate that at the time it was written there was no mutual understanding between us as to the issues involved.

Respectfully,

Register of Copyrights

Manheim Rosenzweig, Esq.,
Two Columbus Circle,
New York, New York.

IN THE DISTRICT COURT OF THE UNITED STATES FOR
the District of Columbia
CONCLUSIONS OF LAW

1. The material deposited by plaintiff, and in which registration of claim of copyright was refused by the defendant, is a "book" within the meaning of the term as used in Section 5 of the Copyright Act.
2. The plaintiff obtained a copyright in its book "In Old Chicago" on December 30, 1937, by publication with notice of copyright, and complied with all the prerequisites for registration of its claim of copyright in said book; and deposited copies thereof in accordance with law; and thereupon became entitled to registration of its claim of copyright in the said book and issuance of certificates therefor.
3. The defendant has no power to refuse registration of any claim of copyright when such claim of copyright is entitled to registration under the law. It is a question of fact whether the applicant has complied with the law; if he has complied with the law he is entitled to have the copyright registered; and findings of fact and conclusions of law on the part of the Register of Copyrights may be reviewed and, if erroneous, corrected by this court.
4. The testimony respecting publication without notice is insufficient to establish abandonment of its copyright by the plaintiff.
5. On January 13, 1938, plaintiff deposited in the Copyright Office, Library of Congress, Washington, D.C., two complete copies of the only complete edition then published of said book, and accompanied said deposit with application for registration of copyright on form A-I, supplied by the Register of Copyrights, which application included affidavit as required by Section 16 of the Copyright Act, setting forth that said book had been produced in accordance with the "manufacturing provis-

THE DISCRETION OF THE REGISTER

The claim of discretion in the Register of Copyrights is based primarily upon the express wording of Section 10 of the Copyright Act read in connection with Section 9.

Section 9 provides

"That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act * * *"

and

Section 10 provides

"That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

In interpreting Section 10 of the Act, the Report of the Committee on Patents of the House submitted to accompany H. R. 28192, which became the present Act, contains the following statement:

"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration." (60th Congress, 2d Session, House of Representatives, Report from the Committee on Patents No. 2222 to accompany H. R. 28192, p. 10)

The person who effects the registration is the Register of Copyrights. Hence, before making registration he must find on the facts before him that "the provisions of this Act, including the deposit of copies," have been complied with.

These provisions on which registration is thus conditioned under the statute may be classified in four general groups: (1) applicant must be a person entitled by the Copyright Act to secure copyright; (2) the work must be copyrightable; (3) if a copyrightable, published work, it must have been copyrighted by publication with notice; (4)

deposit and application for registration must have been made.

1. Before making registration the Register must, under the express provisions of Sections 9 and 10, find that the applicant is a person entitled to secure copyright under the Act. That being thus entitled is one of the conditions precedent to obtaining copyright protection appears from the following quotations from the Act:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right * * * etc."

Who the persons thus entitled are is explained in Section 8 of the Act, to wit,

"That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act";

and this section goes on to provide that in the case of foreigners not domiciled in the United States and with respect to whose state or nation the President of the United States shall not have proclaimed the existence of reciprocal copyright conditions, shall not be entitled to the benefits of the Act.

Under Section 9, as already indicated, the securing of copyright by publication with notice can be accomplished only by "any person entitled thereto by this Act"; and under Section 10 it is only "such person" who may obtain registration of his claim to copyright by complying with the provisions of the Act.

Again, under Section 23 of the Copyright Act it is only certain persons who are entitled to apply for renewal of a copyright already secured. If on the facts before him the applicant is not, in the

reasoned opinion of the Register, one of such persons, registration will be refused, and the courts have by implication recognized the propriety of the action. (White-Smith Publishing Co. v. Goff, 180 Fed. 256, 257; on appeal, 187 Fed. 247, 252)

From the above sections, particularly Sections 9 and 10 read together, it seems clear that before registration of a claim to copyright can be made the Register must on the facts before him determine whether or not a person is "entitled to secure copyright" within the meaning of the Act.

2. The work must be copyrightable.

If the work is not copyrightable, no one can secure a copyright in it, and Sections 9 and 10 read together make it plain that in the absence of securing a copyright, no claim for registration can be set up by the applicant.

Section 4 provides

"That the works for which copyright may be secured under this Act shall include all the writings of an author";

in other words, denies copyrightability to works devoid of authorship.

Section 7 of the Act supplements this rule in that it provides

"That no copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof."

Again, in order to be accorded copyright protection, books in the English language must, generally speaking, be manufactured in the United States; otherwise, they are not copyrightable (Sec. 15), and compliance with the manufacturing provisions of Section 15 is a condition

precedent to a valid registration of the copyright. (See Sections 12, 16 and 17, and Opinion of the Attorney General, Vol. 28, pp. 150-152.)

3. Registration cannot be made in the case of a copyrightable, published work until copyright has been secured therein.

Section 12 of the Act provides

"That after copyright has been secured by publication of the work with the notice of copyright as provided in of section nine of this Act"

deposit and application for registration shall be made.

The Act covers the obtaining of copyright both with respect to certain works when unpublished (Sec. 11) and all works when published (Sec. 9 read in connection with Secs. 12, 18 and 19). Since the

right to registration is made to depend in part on the securing of copyright, the Register must determine on the facts before him whether or not copyright has been secured in accordance with the provisions of the Act. These observations can be restricted to instances of published works, since allegedly published works only are involved in this case. Copyright is secured in such works by publication with the material entitled "In Old Chicago" was actually the subject of the copyright notice prescribed by Sections 18 and 19 of the Act. If, on examination of the application, correspondence, if any, and the deposit, the Register is forced to the conclusion that publication has not taken place or that if it has, the copyright notice either in form or location is not such as is prescribed by the Act, he must refuse registration, or else fail to meet his obligations under Section 10; for on the evidence before him the applicant in such case has failed to comply with the provisions incident to the securing of copyright implicit in the Act.

i.e., whether the deposits are issues of the newspaper itself.

4. The deposit of copies and submission of application for registration must be made, and must precede registration in order that the Act be complied with.

The so-called "formalities" of deposit and the filing of application for registration (claim of copyright) of Section 12 and the filing of the affidavit of American manufacture in the case of books (Sec. 16) are conditions which, although copyright may have been secured in a copyrightable work by publication with notice by a person entitled under the Act to secure it, are as essential to secure the statutory right of registration as the securing of the copyright itself.

In order to meet his obligations under Section 10--i.e., to register if and when the provisions of the Act are carried out, and to refuse to register if they are not--the Register must determine on the facts before him whether the provisions of Section 12 have been met. In the present instance he must determine (1) whether the material entitled "In Old Chicago" was actually the subject of a bona fide publication accompanied by the adequate copyright notice; (2) whether such material was a "book" as claimed within the meaning of the deposit provisions of Section 12 and, if so, whether those deposits took the form of "two complete copies of the best edition"; (3) whether the material consists of contributions to periodicals, as opposed to "books" for the purposes of deposit and registration; and, if so, whether the deposits made are the deposits required for contributions to periodicals by Section 12; i.e., whether the deposits are issues of the newspaper itself.

Any contribution to any issue of a newspaper is, if published with

He has decided that the material offered is, first of all, proof material; that, in his best judgment, proof material is not what Congress had in mind when, with respect to books, it required by Section 12 deposits of "two complete copies of the best edition thereof." In concluding that the term "two complete copies of the best edition thereof" does not mean "two proof copies thereof," the Register relies upon the ordinary meaning attributed to words, in the first place, and in the second place, upon the announcement of Congress in Section 59 of the Act of the purpose of the deposits, which section reads as follows:

"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

Nor does the Register feel that proof material was what Congress had in mind when in Section 12 it provided that with respect to contributions to periodicals the deposit which the Register was to receive was "one copy of the issue or issues containing such contribution."

✓ The Register's discretion with respect to fees:

Under Section 61 of the Copyright Act the Register shall receive certain fees, specifically,

"For the registration of any work subject to copyright, deposited under the provisions of this Act, \$2, which sum is to include a certificate of registration under seal."

Any contribution to any issue of a newspaper is, if published with

is one of art, but in so doing he cannot, of course, act arbitrarily and without good reason."—*Opinions of Attorneys General*, Vol. 28, 1909-1911, pp. 557, 561.

copyright notice and in essence copyrightable, a "work subject to copyright." Under Section 50 of the Act the Register of Copyrights gives bond to the United States for \$20,000 for the faithful discharge of his duties. The Register would not be faithfully discharging his duties if he did not demand the payment of the fees provided by the Act. He must determine for himself the amount of fees required in any given case; and it is believed that such determination, if the result of the exercise of a reasonable discretion, will be accepted by the courts in mandamus proceedings.

In reaching his conclusions the Register has in this case, as in all others, been placed in a position where he felt bound to make findings of fact, interpret the Copyright Act, and apply it to the extent called for in connection with the fulfillment of his duties of registration of claims of copyright. It is respectfully contended that such findings and interpretation should be accepted by this Honorable Court if it feels that there is reasonable ground for either.

The following authorities are cited in support of the above contention:

(1) As to the findings of the Register on questions of fact:

(a) as to works of art

In an opinion of the Attorney General dated January 9, 1911, he stated, referring specifically to works of art as the term is used in the copyright statute:

"The phrase appears to be a new one in the copyright statute, and experts would doubtless often differ as to its application; and the Register of Copyrights must, therefore, when application for registration is made, determine for himself the question whether the work presented is one of art, but in so doing he cannot, of course, act arbitrarily and without good reason."--Opinions of Attorneys General, Vol. 28, 1909-1911, pp. 557, 561.

Again, on July 30, 1915 (Opinions of Attorneys General, Vol. 30, 1913-1916, pp. 422, 424 and 425) the "power vested in the Register to issue rules and regulations under which he will permit registration under the law" (p. 424) was made the matter of special comment by the Attorney General; indicating in his opinion that the Register "has at least some measure of discretion in the administration of the Act;" and "manifestly in the exercise of that discretion he may make such investigation and require such showing of compliance with the law as may be necessary to enable him to determine whether the prerequisites imposed have been met." (ibid 424, 425)

"If," continued Attorney General Gregory, "the contention be correct that the register is vested with no discretionary powers of investigation, and has no authority to demand a satisfactory showing of compliance with the plain conditions prescribed by law as prerequisites to the issuance of copyrights, that officer is reduced to the rôle of a mere automaton, who, upon receiving an application for copyright of a lithograph, must register and issue a certificate therefor, which shall thereafter be accepted in the courts as prima facie evidence of the facts stated therein, even though the legal prerequisites to the valid registration of the copyright may have been wholly ignored. Clearly, such a construction would serve to defeat the purpose and intent of the act."

Here, again, as in the former opinion rendered in Vol. 28, ante, the question was raised as to whether or not material submitted for registration constituted separate reproductions of works of art, and here to like effect as in the former opinion, the Attorney General stated:

"There is no attempt in the statute to define this term. Its definition is a mixed question of law and fact which in the first instance is to be left to the sound discretion of the Register of Copyrights (28 Op. 560, 561.)"

"The question whether the four specimen prints transmitted by you are 'works of art' within the meaning of

the statute as above construed is, as has been stated, principally a question of fact, the solution of which involves the exercise of artistic judgment and discretion, and which should be determined, therefore, by the Copyright Office rather than by the Attorney General." (*ibid* 426, 427)

(b) as to "books"

The Circuit Court of Appeals for the 7th Circuit used language which indicated a recognition on its part of the authority in the Register of Copyrights to designate certain written material as coming within the definition "book," always provided, it is assumed, that the conclusion reached was not an arbitrary one. The court said:

"Copyright Bulletin No. 15, defining what may be copyrighted under the term 'books', says:

The term 'book', as used in the law, includes tabulated forms of information, frequently called charts, tables of figures showing the results of mathematical computation, such as logarithmic tables, interest, cost, and wage tables.

"By administrative construction appellant's publication is a book."—Edwards & Deutsch Litho. Co. v. Boorman, et al, (15 F. 2d. 35)

(2) As to the interpretations of the Copyright Act by the Register of Copyrights:

The following citations seem quite definitely to express the judicial conception not only that under the present Act is it one of the normal functions of the Register of Copyrights to interpret and apply the statute within the field of copyright registration, but that his views, while not compelling with respect to the courts, are entitled to great weight and will not be disturbed unless his discretion appears to have been abused.

The right of the Register to refuse to register an application for renewal of copyright on the ground that the person making the application

was not one of those entitled to renew under the statute was apparently taken for granted in the case of White-Smith Music Publishing Co. v. Goff--which was an action for infringement--both in the district court and on appeal. Both in the court of first instance and on appeal the court sustained the interpretation placed on the Act by the Register. In the opinion rendered in the district court the Judge pointed out at the outset that

"The Register of Copyrights refused registration for a renewal or extension of copyright under Section 24 of the new copyright law (Act March 4, 1909, c. 320, 35 Stat. 1080 [U. S. Comp. St. 1909, p. 1296]) on the ground that it could be made only in the name of one of the designated beneficiaries and not in the name of an assignee." (180 Fed. 257)

In the decision rendered by the Circuit Court of Appeals (187 Fed. 247)

Judge Putnam pointed out that the complainant

"offered registration under the statute, and, although registration was refused, yet it fully complied with the requirements of law, and is entitled to maintain this suit if it had any statutory right to the extension." (*ibid* 247)

And again:

"In the present case the letter of the statute had not been complied with by any application for an extended copyright made by the author, or by any others designated in connection with such application if he was not living." (*ibid* 252)

Relief was refused in each court on the very ground on which the Register refused registration--i.e., that a publisher who applied for renewal registration was not--in contradistinction with the author, if living--entitled to that right.

For a number of years, however, legislation has been sought and bills to that effect have been introduced in Congress, to extend the copyright protection to such designs."--Donner Bros. v. Maria Silk Corp. (Dist. Court, S. D. New York, May 7, 1939); Copyright Office Bull. 23 "Copyright Decisions, 1934-35," p. 158.

"Section 53 of the Copyright Act authorized the register of copyrights to make rules and regulations for the registration of claims to copyright. Rule 12-g (U. S. C. A., title 18), under which plaintiff files its application, reads as follows: '12 (g)--Works of art and models or designs for works of art.' This term includes all works belonging fairly to the so-called fine arts (paintings, drawings and sculpture).

"This permits registration of works of art or designs, for works of art such as 'paintings, drawings and sculpture.' Plaintiff stated in its application that it was filing a drawing for registration. The dress itself could hardly be classed as work of art and filed in the register's office. Moreover, the regulation just quoted lists 'garments' among those articles in which 'the exclusive right to make and sell * * * should not be sought by a copyright registration.' All the plaintiff could accomplish under this section was to register its drawing, and unless we read into the statute something which is not there plaintiff secured no exclusive monopoly of the dress shown in the drawing.

"In August, 1933, in response to a written inquiry from a designer of dresses, the register of patents [copyrights] replied as follows: sec. 5, 35 Stat. 1076; August 24, 1912, c. 336,

There are no provisions in the copyright law for protecting fashions for dresses. The right to make and sell an artistically designed garment may under proper circumstances be obtained by a design patent issued from the Patent Office but not by copyright.

"This administrative interpretation of the law is, of course, not conclusive, but it is entitled to weighty consideration."--J. Adelman, Inc., v. Sonner's & Gordon, Inc., et al. (Dist. Court, S. D. New York, March 26, 1934) 21 U. S. Pat. Q. 218-19.

"In the opinion of the learned and experienced Registrar of Copyrights, the copyright law as heretofore and now in force affords no protection for designs for articles of manufacture. For a number of years, however, legislation has been sought and bills to that effect have been introduced in Congress, to extend the copyright protection to such designs."--Cheney Bros. v. Doris Silk Corp. (Dist. Court, S. D. New York, May 7, 1929); Copyright Office Bull. 20 "Copyright Decisions, 1924-35," p. 158.

The protection of productions of the industrial arts utilitarian in purpose and character, even if artistically made or ornamented, depends upon action under the patent law; but registration in the Copyright Office has been made to

"The plaintiff, a corporation, is a manufacturer of silks, which puts out each season many new patterns, designed to attract purchasers by their novelty and beauty. Most of these fail in that purpose so that not much more than a fifth catch the public fancy. Moreover, they have only a short life, for the most part no more than a single season of eight or nine months. It is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these; it would also be impossible to know in advance which would sell well and patent only those. Besides, it is probable that for the most part they have no such originality as would support a design patent. Again, it is impossible to copyright them under the Copyright Act, or at least so the authorities of the Copyright Office hold." Cheney Bros. v. Doris Silk Corp. (Circuit Court of Appeals, 2d Circ., Oct. 21, 1929) 35 F. (2d) 279; (*italics vol.*)

"It should be noted that the form of the application as prepared by the Register of Copyrights does not express his arbitrary interpretation of the statute. Rather, it is apparent that the Register of Copyrights prepared the form in accordance with the provisions of the act of March 4, 1909, c. 320, sec. 5, 35 Stat. 1076; August 24, 1912, c. 336, 37 Stat. 488 (U. S. Code, title 17, copyrights, sec. 5), which in part reads as follows:

Sec. 5. Classification of works for registration. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(g) Works of art; models or designs for works of art.

"The application form, it is true, includes the words 'painting, drawing, or sculpture,' which are not specifically mentioned in the foregoing section, but the addition of those words represents a fair intendment of the section.

"Moreover, the classification which the Librarian of Congress has promulgated in accordance with the Copyright Act reasonably defines the scope of section 5, subdivision (g). The 'Rules and Regulations for the Registration of Claims to Copyright' sets forth:

Rule 12, (g) Works of art and models or designs for works of art. This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character, even if artistically made or ornamented, depends upon action under the patent law; but registration in the Copyright Office has been made to

In connection with the question of the discretion with which the Registrar of Copyrights may protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture. The following

may be of Toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles are examples. The exclusive right to make and sell such articles should not be sought by copyright registration."--Kemp & Beatley, Inc., v. H. Hirsch and E. Berquist, (Dist. Court, E. D., New York, Aug. 1, 1929) 34 Fed. (2d) 291.

Registrar to a certain extent at least of the discretion with which he was then, as he is now, vested in connection with the performance of

"It is conceded that the Copyright Office at Washington has made all renewal registrations since the 1909 act came into effect in accordance with the 1909 act. While, of course, their interpretation is not final, the administrative interpretation of a law is entitled to great consideration."--Stephens et al. v. Howells Sales Co., Inc., (Dist. Court, S.D. New York, Dec. 15, 1926), 16 F. (2d) 305. (italics vol.)

revision of the Copyright Law before the Senate on February 11, 1909, H. R. 6993, pp. 180 and 181

"The practical interpretation which for a long time had been given to this statute by the Copyright Office for the registration of copyrights required the applicant to state whether the article for which he desired copyright is a book, musical composition, engraving, or other thing as defined. Articles named in the copyright statutes as subject to copyright were classified on the application blanks, and the rule has provided that, if only the words of a song were desired to be protected, the application should be made out for a 'book'; whereas, if protection was desired for both words and music, the application had to be made for a 'musical composition.' The Copyright Office in 1905, in further interpretation of the statute enumerating the classes of articles which became subjects of copyright protection, informed persons generally that, 'if the words only of a song are desired to be protected, the designation 'book' should be used.' Under these rules a copyrighted 'musical composition' covered words and music; while, if the applicant intended to copyright only the words of a song, he must have designated his work under the classification of 'book,' which has been construed to be a literary composition. (Littleton et al. v. Oliver Ditson Company, C.C., 62 Fed. 597; Hervieu v. J. S. Ogilvie Pub. Co., C.C., 169 Fed. 978)."
--M. Witmark & Sons v. Standard Music Roll Co. (Circ. Court of Appeals, 3d Circuit, Mar. 20, 1915. (italics vol.)

In this connection see Rule 10 (e) of the Copyright Office.

In connection with the question of the discretion with which the Register of Copyrights is vested under the present Act, the following may be of interest.

When, in 1930, hearings were held on the so-called Vestal Bill before the House Committee on Patents, the bill as discussed contained certain provisions, the obvious purpose of which was to deprive the Register to a certain extent at least of the discretion with which he was then, as he is now, vested in connection with the performance of his duties of copyright registration.

These provisions were made the subject of protest before the Committee by William L. Brown, then Assistant Register of Copyrights.

The following is quoted from Part I of the Hearings on the General Revision of the Copyright Law before the Committee on Patents of the House, 71st Congress, second Session, on H. R. 6990, pp. 180 and 181:

"MR. BROWN. * * * In section 36, page 30, line 19, it is stated that the copyright office shall have no discretion to refuse to receive such applications nor refuse to register the work. And in section 58, on page 42, line 13, among the provisions for assignments, the statute reads:

"The register of copyrights shall have no discretion to refuse to record any instrument presented to him for recording.

"MR. BROWN. In things which are not subject to copyright.

"I wish to protest against this restriction of discretion on the part of the Copyright Office. It is not consistent with the provision in another part of the measure that the register of copyrights shall make rules, and the copyright office is faced almost every day with applications which are not in accordance with the provisions of the statute. The statute itself determines what shall come under the provisions of copyright, works of literature, drama, music, and fine arts.

Suppose we get a wheelbarrow or a stuffed doll baby or an iron puppy dog with an application for copyright. Is the office to exercise no discretion? We once had an application for the copyrighting of the tricks of a trained bear, in order to prevent another trained bear from performing the same tricks. Under this provision we should have no discretion but to enter it.

"MR. LANHAM. Now, section 36 on page 30 says:

"The copyright office shall have no discretion to refuse to receive such application nor to refuse to register such work.

"Does the qualification there in the word 'such' so restrict as to make the meaning clear?

"MR. BROWN. Well, it would be at least a little doubtful as to whether it did or did not, I think. And I think the provision is put in without an appreciation of the difficulties that we have to face day by day. Take in the other matter here, the matter of recording copyrights, we receive copyrights which should be registered at the Patent Office sometimes. We receive assignments, informal assignments and assignments that are without signature. Are we to put them on the book regardless of whether we thereby safeguard the applicant or not? It does not seem so. It does not seem as though the office should be prevented from exercising administrative discretion.

"MR. LANHAM. May I ask this question, Mr. Brown. If a limitation were put in this provision making it applicable only to instruments which are subject to copyright under the provisions of this law, would it then be all right in your judgment?

"MR. BROWN. Of course. The office is there to execute the provisions of the law. We are most anxious to execute them when it comes within the provisions of the law, but we do not wish to be deprived of any exercise of discretion in those things.

"MR. LANHAM. In things which are not subject to copyright?

"MR. BROWN. In things which are not subject to copyright.

"MR. LANHAM. I assume that there is no intention to deprive you of that right.

"MR. BROWN. You see how impracticable it would be. * * *

The Vestal Bill never became law. The proposal to deny discretion to the Register seems to have been abandoned and has not since appeared in any copyright bill presented to Congress.

MEMO re THE PURPOSE OF THE DEPOSIT--TO WIT, THE
ENRICHMENT OF THE LIBRARY OF CONGRESS

It is conceived that this thesis--that the purpose of the deposit is to enrich the Library of Congress--will be opposed by an argument to the following effect:

"All deposits made with the Copyright Office are not taken over by the Library of Congress. The Library makes its own selection. 'Two complete copies of the best edition' must be filed with the Copyright Office even where the form of the deposit is two common sheets of paper bearing, say, a limerick of no special merit taken from the standpoint of the development of the arts and sciences, once publication thereof with the adequate copyright notice shall have been established. This material would not enrich the Library of Congress if taken over by it, and the chances are 100 to 1 against the Library taking over such material."

But the difficulty of the argument lies in the fact that of the material submitted a vast amount consists of books, taking the term in its usual meaning, and not of the exceptional material which, it may be admitted, is of no value whatever from any library point of view. Let us limit ourselves to books. What is accomplished by Section 12 in demanding that there shall be deposited under Section 12 two complete copies of the best edition of books; and by Section 13 in providing that if a person refuses, upon demand for such copies, to provide them, he shall inter alia, pay to the Library of Congress twice the value of two complete copies of the best edition of such books, is that the purposes of Section 59 of the Act shall be carried out, to wit, that the material in question shall be transferred to the permanent collections of the Library of Congress, including the Law Library; or that it shall be placed in the reserve collections of the Library of Congress for sale or exchange; or that it shall be transferred to other governmental libraries in the District of Columbia for use therein. Two complete copies of the best edition obviously serve the purposes set out in Section 59. Obviously two incomplete copies of the best edition would not serve that purpose. On the other hand, it may be that two complete copies of the next to the best edition would serve it, but the line must be drawn somewhere. In accepting deposits, the Register must take into account whether the purposes of Section 59 are served. As above stated, those purposes might be served by two complete copies of the second best or third best edition. But aside from the mandate of "two complete copies of the best edition" prescribed by Section 12--in determining whether the deposits are in fact, two complete copies of the best edition--the Register must decide whether, being what they are, these deposits meet the purposes of the Act. The question of what does constitute the best edition is always a question of fact and is a matter concerning which two different opinions may be entertained. But there must be a limit somewhere; and that limit becomes defined once it is apparent that by accepting deposits in a certain form the purposes of Section 59 will obviously not be met. It is believed to be beyond argument that page proof transcends that limit. In any event, it is the calculated opinion of the Register that it does so--which is the vital point at issue in connection with the exercise of a reasonable discretion of the Register in passing on the point. Congress was, of course, aware when its legislation took the form of

Section 12 that every item deposited in the Copyright Office would not, if accepted by the Library, enrich it from the bibliographical point of view, and likewise aware that because of this fact it would not be taken over by the Library. But in providing that the deposit should (except in the case of contributions to periodicals) consist of complete copies of the best edition of books, Congress announced its intention that of all the material the Library might take over, the Librarian should be furnished without cost with two complete copies of the best edition thereof.

It is the studied conviction of the Register that when Congress provided that there should be, in the case of printed books deposited with the Copyright Office, two complete copies of the best edition thereof, it did not mean that Congress should be provided with two complete copies of page proof thereof. And the Register does not believe, after careful examination of the law, that it was intended that by publishing two complete copies of page proof and depositing this proof with the Copyright Office, the specific provisions of Section 12 with respect to the nature of the deposit required in the case of books and the obvious purpose of the deposit as reflected in Section 59, could be defeated by a transparent device which takes the form of publishing proof of printed material which is intended to become for the first time generally available to the public in what is generally recognized to constitute in common parlance and common understanding a book.

I append a statement of the Librarian of Congress which appears in "Copyright Hearings—Bills S. 6330, S. 2499, S. 2900, H.R. 19853, H.R. 243, H.R. 11794—June 1906, December, 1906, March 1908," pages 14 and 15:

"The other matter is that of copyright deposits. The volume of these is now prodigious. During the last year alone the articles deposited exceeded 200,000 in number. A large proportion of these are of great value to the Library and are drawn up into it. The rest remain in the cellar. The accumulations in the cellar now number a million and a half items. Many of these would be useful in other Government libraries; for instance, medical books in the library of the Surgeon-General's Office. Some of them might be useful in exchange with other libraries. A few might have value in exchange with dealers. The remainder are a heavy charge upon the Government for storage and care, without any corresponding benefit. They ought to be returned to the copyright proprietors if they want them, or, if not wanted, destroyed. Such dispositions are, I believe, already within the authority of law; but it is fair that they should be expressed. The bill (secs. 58 and 59) definitely expresses them. I ask your attention to them in due course. They have been accepted by the conferences, and therefore by the interests outside of the Government most nearly concerned with their operation. But they may awaken some apprehension elsewhere because of a quite common misunderstanding of the significance of the deposit and its relation to the copyright protection.

"The original purpose of such deposits was the enrichment of the Library. This is clear from their history, both in this country and abroad. They

were made a condition of securing copyright, but they had no continuing relation to the copyright once secured. In England, for instance, the copies required (now five) are to be for the use of the libraries--five libraries--no one of which is the office of registration for copyrights. The earliest act in this country was that of Massachusetts, in 1783, which exacted a copy as a gift to the library of the University of Cambridge, Harvard University, 'for the use of said university,' which was not the office of copyright. The earliest act providing for deposit in the Library of Congress, that of 1846, provided that the copyright proprietor should give one copy of the book to this Library, and at the same time it provided that he should give one copy to the library of the Smithsonian for the use of that library.

"In 1867 the library of the Smithsonian became a part of the Library of Congress. The act of 1870 provided two copies, both to be addressed to the Library of Congress. But by that same act of 1870 the Library of Congress became the office of registration for copyright; and from that time, and because the failure to deposit not later than the date of publication actually voided the copyright, an impression has grown up that the articles deposited are an integral part of the record of registration, and have a peculiar sanctity as such. The fact of the deposit has been and will be an integral part of the record, and in times past this could most readily be proved by the copies themselves, the law providing neither for a certificate to the claimant admitting the receipt of the deposit nor an entry in the official record showing it. But hereafter the fact of deposit will be proved by the certificate itself.

"There is an impression--a very natural one, too--that the copies deposited are necessary evidence of the thing copyrighted, and essential as such in litigation. Now, during the past thirty-six years the copyright office has record or memory of only four cases in which articles deposited have been summoned into court, and an authority on copyright litigations remarks that in three of these he is quite certain that the reason was a fanciful one, and in the fourth he did not see any necessity for it.

"For the matter of that, however, there is little prospect that any article of sufficient importance to be a subject of litigation would be deliberately destroyed, or would fail to be drawn into the permanent collections of the Library--at least one copy of it."

Memo. Re 20th Century-Fox Film Corporation
v. Bouve - Law 89,881.

At the trial Mr. ~~Mr~~ Wolf in the course of his
argument, made the following statement:

We knew we were going to have a case on our
hands and admit it was prepared for the pur-
pose of bringing the question before your
Honor.

Wolf whether or not

W. we knew we were going to have a case on our hands
and admit it was prepared for the purpose of
bringing the question before your honor

the purpose that suit?

W. we admit that this
case was prepared for
the purpose of bringing the
question before your honor.

H. I. Goolbsy

See that the above statement
was made by Wolf when he was attempting
to explain why Wingard claimed
to remember the exact date of Dec. 30, 1937,
the alleged date of publication

H.L.G.

4-16-40

Memo. Re 20th Century-Fox Film Corporation
v. Bouve - Law 89,881.

At the trial Mr. ~~Mr~~ Wolf in the course of his argument, made the following statement:

We knew we were going to have a case on our hands and admit it was prepared for the purpose of bringing the question before your Honor.

When the court asked Mr. Wolf whether or not mandamus should lie in connection with a "made-up case", he then tried to withdraw from the above noted admission. In my argument, I read the above noted stated to the court, as the statement having been made by Mr. Wolf, and he did not deny having made such statement. The two notes attached hereto are in the handwriting of Mr. Howell and are the statements attributed to Mr. Wolf. Mr. Howell wrote these statements at the time of the argument about five or ten minutes after Mr. Wolf had addressed the court as quoted.

H. L. Goffey

Note further that the above statement was made by Wolf when he was attempting to explain why Wingard claimed to remember the exact date of Dec. 30, 1937, the alleged date of publication

H. L. G.

4-16-40

Address Reply to
"The Attorney General"
and refer to
Initials and Number.

DEPARTMENT OF JUSTICE,
Washington.

G.

M R

92503

November 3, 1906.

Sir:

I have the honor to reply to your request for an expression of opinion concerning a matter which has arisen in the administration of the Copyright Office in connection with the application for registration of the title of a book entitled "Growth, A novel by Graham Travers."

It appears that the author of the work is English, and that it has been published in London. Accompanying the application for copyright were two copies of very indifferent proof sheets stitched together with a cover title, but no regular title page. The type was set up in this country and only three copies of proof sheets were printed.

The Librarian of Congress desires to know whether the Copyright Office is authorized to register the title of the book and to accept the two sets of proof sheets as a full compliance with the law.

I incline to think that proof sheets of the character described do not constitute "copies of such copyright book," within the contemplation of the statute, and recommend that they be rejected. If the parties presenting them have the rights asserted they may seek a remedy through the courts.

The President, p. 2.

I return herewith the communication of the Librarian of Congress with its enclosure - a memorandum from the Register of Copyrights.

Very respectfully,

(Signed) M. D. Purdy.

Acting Attorney General.

To the President.

Enclosures - 11541.

PRELIMINARY OPINION BY JUSTICE BAILEY
DURING THE TRIAL (R. 347)

The Court: I have necessarily, during the progress of this case, formed some tentative views. If I should express them now, if it would assist counsel in preparing their briefs, I will; otherwise I will withhold them.

the general rules, the Court would not undertake to assist any-

The Court: I think it may assist counsel in connection with their briefs. I think the position of the Register of Copyrights is somewhat similar to that of the Register of Deeds. I think neces-

sarily he has to pass upon the question first as to whether a paper should be registered. The Register of Deeds, of course, would have to pass on the question of whether it is admissible or not

and, in a question of this kind the Register of Copyrights would have to pass first on the question of whether or not a copyright is subject to registration under the statute.

I do not think his findings of fact are binding on the Court.

I think if the Court thinks his finding is erroneous the Court can, by mandamus, require registration of the copyright.

Of course, the burden of proof is upon the party seeking the registration to show in court that he is entitled to registration. I do not think that the Register of Copyrights is confined to the arbitrary question of what is subject to copyright. I think he has the right, of course, to prepare forms for the convenience of those seeking copyright, but parties seeking copyrights are not necessarily limited to those forms if the Court think they do not cover all the cases.

As I said before, I think the burden of proof is upon the party seeking registration to show the Court that he is entitled under

44
The Court:
The Court:
The Court:

PRELIMINARY STATEMENT OF JUSTICE SUTHERLAND
DURING THE TRIAL, 1917

The Court: I have necessarily, during the progress of this case, the Act to registration.

In the question of publication I think that there must be a bona fide publication, a real publication, but if not bona fide under the general rules, the Court would not undertake to assist any one who has made merely a colorable publication which he does not deem bona fide to comply with the statute.

Now, gentlemen, those are my tentative views, and counsel in their arguments may be able to convince me I am wrong, but those are my present views in the case.

and, in a question of this kind the Register of Copyrights would have to pass first on the question of whether or not a copyright is subject to registration under the statute.

I do not think the findings of fact are binding on the Court.

I think all the Court would be finding is whether the Court can, by evidence, establish registration of the copyright.

As before, the burden of proof is upon the party asserting the right to claim the work that he is entitled to registration. I

do not think that the Register of Copyrights is entitled to the arbitrary question of what is subject to registration. I think he

has the right, of course, to prepare rules for the maintenance of these books of copyright, but published matter copyright is not necessarily limited in these cases if the Court think they do not cover all the cases.

As I said before, I think the burden of proof is upon the party seeking registration to show the Court that he is entitled under

Godfrey;

Report No. 2222 (accompanying the 1909 bill) was put in evidence, by plff for the sake of the remark on p. 20 in re rules; "Section 53 provides for the making of rules and regulations and does not confer upon the Register any judicial functions"

On the other hand, at the bottom of p. 10 this appears:
"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration".

Obviously, the Register must exercise his discretion to determine whether or not "what must be done" has in fact been done, ~~judging~~xxxxxxx basing his judgment upon the application and deposit made in support thereof

That his functions are not purely ministerial is demonstrated by the fact that, ~~in~~ for example, under Sec. 5 the applicant shall state to which of the enumerated classes his work belongs, but the Register is not obliged to accept the applicant's classification. If applicant designates his work as a periodical, but the Register deems it is a book, the Register may demand the affidavit required for a book in Sec. ~~17~~ 16. The applicant may designate his work as a "work of art", but (as the ~~Attorney~~ General has declared) it is for the Register to determine whether or not it is a work of art. Or if the applicant designates his work as a "design for a work of Art", the Register may find that it is in fact a design for an article of manufacture, and refuse to register on the ground that the work comes within the design patent law (R.S. 4929)

H.A.S.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF COLUMBIA.

ERNEST J. SVENSON,	:	
Petitioner,	:	
vs.	:	<u>AT LAW,</u>
	:	
CONWAY P. COE,	:	No. 89,114.
Commissioner of Patents,	:	
Respondent.	:	

BRIEF FOR THE COMMISSIONER OF PATENTS.

This case comes before the court on a petition for the issuance of a writ of mandamus, the rule to show cause, respondent's return to the rule and petitioner's motion for judgment notwithstanding that return.

In the petition this court is asked to review certain decisions rendered in the Patent Office and determine that they were in error, and issue a writ of mandamus directing the Commissioner of Patents to institute a so-called "public use" proceeding which he has, through an Assistant Commissioner, refused to institute.

It is not alleged in the petition that the Commissioner has refused to act on a matter on which by statute or by a rule of the Patent Office he is required to act. Nor does the petitioner cite any statute or rule which made it mandatory upon the Commissioner to have taken the action which the court is now asked to compel him to take.

On the contrary no statute is relied upon and the only rule of the Patent Office which is cited in the petition, viz. Rule 11, by its very terms leaves the matter to the discretion of the Commissioner.

The second paragraph of that Rule, which is all that is

NOTES

1. No irreparable injury.
2. Courts should not displace the judgment of administrative officers or bodies in matters within their jurisdiction.
3. Presumption of validity attends official action, and the burden of proof to the contrary is upon him who challenges such action.
4. Action clearly within administrative power.
5. Action not capricious or arbitrary.
6. Plaintiff will suffer no irreparable injury.
7. And further answering, defendant avers that his action is not capricious or arbitrary; that his election to receive issues of the aforesaid newspaper containing such contribution in lieu of page proof with the application for registration, is within his administrative discretionary power; that plaintiff will suffer no injury, irreparable or otherwise by the submission of the newspapers with the application for registration; and that the plaintiff has not overcome the presumption of validity attendant upon the official action of the Registrar in this case.
8. Purpose is to enrich Library of Congress. 291 Fed. 714, 715.
9. Two copies of a single work were removed from encyclopedia and deposited. Held this was sufficient. 56 Fed. 764, 770.
10. Galley proof received in Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. (2d) 556.
11. A page taken out of a volume and not complete in itself, is not a book such as may be copyrighted. Scoville v. Toland, Fed. Cases, 12553; 21 Fed. Cases 863, 864; 28 Op. At. Gen. 176 (1916).
12. The Registrar desires that we file an amended bill alleging that material submitted was not a book.
13. On January 26, 1938, the Registrar stood ready and willing to issue a certificate on the basis of the newspaper editions, since in his opinion they then constituted the best edition of the books then published--not the mere page proof alleged to have been published at an earlier date. Form A-5 could have been used by plaintiff on January 26, 1938.

14. According to Mr. DeWolfe we have two legs to stand on. As to one, the position is that page proof is not the "best edition" within the meaning of Section 12 of the statute. As to the other leg, the Registrar has the right to elect which of several available published editions constitutes in his opinion the best edition within Section 12.
15. According to the Registrar the question is this: This material created for one purpose only, used in the past for that purpose and to be used in the future for that purpose, to wit, sale and distribution to the public in the form of contributions to newspapers, which its nature as such material as the outcome of the process of causing separate proofs thereof to be assembled, bound between covers, and the result labeled "a book."

DISCRETION OF REGISTER

In support of the contention that the Register has discretion to pass upon the question as to what shall constitute, for the purposes of the Act, complete copies of the best edition of a work, Section 10 is mainly relied upon.

I requote the Section here as follows:

"That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

It would seem necessarily to result from the fact that from the words "upon such compliance the register of copyrights shall issue...the certificate," until such compliance he shall not issue it. In this connection it may be observed that an interpretation to this effect is to be found in the Report of the Committee on Patents, submitted to accompany H.R. 28192, dealing with the present Act. It is stated in this Report:

"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration."

The matter of the duty of the Register to issue a certificate of registration involves necessarily the question of a duty to register—a process which in the nature of things must be regarded as a step which precedes registration. In other words, while Section 10 does not state in so many words that the Register of Copyrights shall register a claim of copyright upon compliance by the applicant with the provisions of the Act, there was no necessity in Section 10 for such specific provision because of the provision in that section that such applicant may obtain registration of his claim to copyright by complying with the provisions of this Act.

This idea is repeated in Section 54 which reads as follows:

"That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof."

Specific emphasis is laid in this Section upon the necessity of the making of a deposit "under the provisions of this Act" a condition precedent to entry thereof by the Register. This undoubtedly means entry of the claim of copyright in the record books of the office, which entry of claim will, of course, set out the name of the copy of the work, claim of copyright to which has been made.

Sections 10 and 54 contain the same idea, Section 10 speaking from the standpoint of the right of the applicant to obtain registration, and Section 54 of the duty of the Register to enter the claim which is made conditional upon the deposit of copies.

In connection with this question of the discretion of the Register to determine the question as to whether a deposit accompanying an application is a deposit which calls for registration within the meaning of the Act, reference has already been made to the opinion of the Attorney General, volume 28, pages 557-561. As already pointed out in a previous memorandum, the Attorney General spoke with peculiar reference to the registration of works of art. He stated that the term "a work of art" appeared to be a new one in the copyright statutes and was one with respect to which experts would doubtless often differ as to its application. He said, further, that whether a particular item was a work of art "does not present a question of law but one of fact, and is not therefore one for decision by me"; and followed this statement up by the assertion that when application for registration of such material is made, the register must determine for himself the question as to whether the work presented is one of art. In view of the fact which appears both from the wording of Sections 10 and 54 read together and the interpretation placed on Section 10 by the Committee in its Report, already referred to, that registration and certification can only be made upon compliance by the applicant with the provisions of the Act; and in view of the fact that one of the conditions of obtaining such registration and certification is the deposit in the Copyright Office of "two complete copies of the best edition" of a book, and the deposit in the case of a contribution to a newspaper of the newspaper in which the contribution is published, it would seem necessarily to follow that whether the deposit in the case of a book constitutes two complete copies of the best edition, or the deposit accompanying an application for registration of claim of copyright in the case of a contribution to a newspaper is a newspaper or periodical, are questions of fact which the Register must determine for himself. Taking as an example "two complete copies of the best edition," and substituting this material in the place of the work of art discussed by the Attorney General, his finding would in his own language, bearing such substitution, read as follows:

"And the Register of Copyrights must, therefore, when application for registration is made, determine for himself the question whether the deposits presented are two complete copies of the best edition, but in so doing, he cannot, of course, act arbitrarily and without good reason. I therefore answer both questions propounded in the affirmative, provided the deposits which accompany the application are two complete copies of the best edition; but whether they are or not is a question for the Register of Copyrights."

And the matter may go even farther than this. In determining what the material is which constitutes the physical manifestation of the writing, application for claim of copyright to which is made, it would seem that the Register would have to answer that question for himself in all cases where the law does not answer it for him.

Section 5 of the Act differentiates between books, which it classifies under subparagraph (a), and "periodicals, including newspapers," which it classifies under subparagraph (b).

While in the parlance and practice of copyright law an article which appears in a periodical is in a general sense a book, this differentiation in Section 5 shows that there is a distinction in the eye of the law to be made in the proper case between a book as such and a newspaper as such. This distinction is carried out in Section 12 in connection with the matter of deposits, which provides that in the case of books the deposits shall be two complete copies of the best edition, and in the case of contributions to periodicals, the deposit shall constitute the periodical itself.

The Register must be the one to determine, in considering the sufficiency of the deposit from the standpoint of Section 12, whether it is a book or whether it is a periodical; but since Section 12 requires that a copy of a periodical shall constitute the appropriate deposit where the claim of registration of copyright is sought to cover a contribution to a newspaper, the Register must also determine whether the purpose to be served by the writing is intended to take the form of a contribution to a newspaper. This becomes of great importance in connection with the matter of fees.

A fee of \$2.00 is required for a contribution to a periodical. Let us say that three separate applications are made for three separate contributions to a newspaper accompanied by three separate copies of the newspaper in which these contributions appeared; the sum of \$6.00 is sent in by way of fees required by the Act, and registration is promptly made. But let us say that these three copies of the three newspapers are stapled together and put between paper covers and application for registration is made of this material as a book accompanied by two bound copies and a single application for it as a book and the fee of \$2.00. It seems plain that the Register would not only have the discretion but the duty to decide that this was not a "book" as the term is used in the Act; for to accept this material as a book and require only a fee of \$2.00 would be obviously to defeat the purpose of the Act in two ways: (1) with respect to the deposit required in the case of contributions to newspapers and (2) to defeat the purpose of the Act with respect to the requirement of the amount of fees in the case of each contribution; for if he accepted the application he would be accepting \$2.00 instead of \$6.00 to which the Government is entitled.

A reference to the comments of the courts as to the interpretation of the Act by the Register will show that the court has regarded with perfect equanimity the expression of the views of the Register with respect to what shall constitute a book under the Act.

If the above reasoning is correct and the Register is not under the obligation of regarding a compilation of three newspapers containing three separate contributions thereto as a book rather than as being what they really are within the meaning of Section 12--separate contributions, for each one of which a fee of \$2.00 is required by the Act--it would seem, to say the least, that his discretion in the matter of registration would extend to the case of the page proof of material obviously intended for publication in newspapers.

For if the finished product in the form of three newspapers containing three separate contributions can be held by him not to constitute a book—not to change its nature from contributions to a book—it would seem necessarily to follow that this metamorphosis cannot be effected where the material takes the form of page proof.

1

A court of equity has power under certain circumstances to restrain a public officer or official agency from the commission of a contemplated illegal act. The question is whether the circumstances of the present case bring it within the rule stated in the cases cited.

The general rule is that the judicial power will not be interposed, either by mandamus or injunction, to limit or direct the action of public executive officers in respect to pending matters within their jurisdiction and control. "Interference in such a case would be to interfere with the ordinary functions of government." Louisiana v. McAdoo, 234 U. S. 627, 633; and see National Life Ins. Co. v. National Life Ins. Co., 209 U. S. 317, 325. Such interference by the courts "with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." U.S. ex rel. Ness v. Fisher, 223 U. S. 683, 693. It was never intended that the courts should displace the judgments of administrative officers or bodies in matters properly within their jurisdiction. Waite v. Macy, 246 U.S. 606, 608; Plested v. Abbey, 228 U.S. 42; U.S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324-25.

It is only in clear cases of illegality of action, therefore, that the courts will intervene (Bates & Guild Co. v. Payne, 194 U.S. 106, 108-09; National Life Ins. Co. v. National Life Ins. Co., supra; Masses Pub. Co. v. Patten, 2 Cir., 245 F. 102, 106) to displace the judgments of administrative officers or bodies. Waite v. Macy, supra. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, 272 U. S. 1, 14-15. The presumption to validity attends legislative and other official action, and the burden of proof to the contrary is upon one who challenges the action.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

KING FEATURES SYNDICATE, INC.
a Corporation
235 East 45th Street,
New York, New York.

Plaintiff,

-against-

CLEMENT L. BOUVE,
As Register of Copyrights,
Library of Congress.

Defendant.

Civil Action #540

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

WARD GREENE, being duly sworn, deposes and says:

I am the same person who verified the original bill
of complaint herein.

Since the filing of the original bill of complaint
herein, I have always been and I now am the Vice-President of the
complainant herein.

I have subscribed the supplemental bill of complaint
and I have knowledge of the contents thereof.

Beginning in June, 1933 the complainant adopted a
system of securing copyright registration for the cartoons and
other works which it has published or authorized to be published
as follows:-

These cartoons or other works were published weekly
in large volumes which were respectively entitled "King Features
Illustrated Weekly" or "King Features Weekly". Each of these
volumes was wholly manufactured and bound within the limits of
the United States of America and pursuant to Section 15 of the
copyright law of the United States of America, and the text of
each of said volumes was always in the English language.

The printed portions of said volumes were always
printed from type set within the limits of the United States

either by hand or by type setting machines or from plates made within the limits of the United States from type set therein.

If the text of said volumes was produced by lithographic process or by photoengraving process, such text was produced by a process wholly performed within the limits of the United States. The printing of the text of said volumes and the binding thereof was also performed within the limits of the United States. To the extent that such volumes were printed or produced in the United States by any processes other than those above specified all the work was done and such process was wholly performed within the limits of the United States.

In every case the title page of each said volume bore the notice "Copyright - - - in the United States of America by King Features Syndicate, Inc.". In the blank space above specified the correct year of first publication of each said volume was duly inserted.

In each and every case the first publication of the text or contents of said volumes was effectuated by selling said volumes and offering the same for sale in the United States of America.

In each and every case said volumes were absolutely sold by the complainant without any reservation of any kind, for resale in the United States of America.

The predecessor in office of the defendant herein, beginning in about June, 1933 and up to about September, 1936 granted copyright certificates upon said volumes and each of them and he accepted the statutory fee per volume.

Beginning about September 1936 and when the defendant herein became the Register of Copyrights, he has continuously and absolutely refused to accept the deposit of the aforesaid volumes or to accept the fees for copyright registration which were tendered to him or to grant certificates of copyright registration on said volumes or any of them.

Beginning about September, 1936 and during the period in which the defendant has refused to grant copyright certificates on said volumes, said volumes in each and every case have constituted the first publication of the subject matter or text of said volumes.

In each and every case and before depositing said volumes in the Copyright Office, duplicates of said volumes had been sold by the complainant in the United States of America without reservation of any kind and the duplicates of said volumes which were thus sold by the complainant were offered for sale within the United States of America by the person or the concern who purchased the same from the complainant.

The subject matter or text of each and every item specified in the demands which are referred to in the supplemental bill of complaint was first published in the United States of America by means of said volumes. A true specimen of each of said volumes is annexed and marked Exhibit E, Exhibit F, Exhibit G, Exhibit H, Exhibit I and Exhibit J.

Each and every of the items specified in the demands, except as otherwise alleged in the supplemental bill of complaint, which are identified in the supplemental bill of complaint, was first published by the actual sale in the United States of America of volumes exemplified by Exhibit E, Exhibit F, Exhibit G, Exhibit H, Exhibit I or Exhibit J and which were in each and every case sold and offered for sale exactly in accordance with the procedure set forth in paragraphs "SIXTH" and "SEVENTH" of the original bill of complaint, and said first publication effectuated by said sales of copies of said composite works in volume form antedated the publication of parts of said works in newspapers as contributions thereto in each and every case.

The dealers who purchased the aforesaid volumes

have publicly exhibited the same within the limits of the United States of America and said dealers offered the aforesaid volumes for sale prior to publication of the subject matter of said volumes in newspapers or the like.

The complainant is a very large publisher and distributor of cartoons and other newspaper features. It is one of the largest concerns engaged in this field in the United States and also throughout the world and its annual business amounts to not less than Ten Million Dollars (\$10,000,000.00).

It has at least eight hundred fifty (850) employees and it has a great many authors and cartoonists under contract.

The foundation of complainant's business is its copyrights, since the complainant derives its income from newspapers ^{which} publish the cartoons and other features put out by complainant, upon payment of license fees unto the complainant.

The complainant is desirous of assuring the defendant of the full payment of all fees to which the defendant may be entitled, even according to the defendant's interpretation of the copyright law, if this action is finally dismissed.

However, if the complainant meets the demands set forth in the supplemental bill of complaint and it makes the deposits and files the applications and pays the fees required by the defendant, the defendant will pay the said fees to the Secretary of the Treasury pursuant to Section 49 of the copyright statute. I believe that it will be impossible for the complainant to recover said fees even though it finally prevails herein. In any event, this action will become moot as to such demands and the corresponding deposits. I verily believe that it is the intention of the defendant to continue making such demands until this case comes to trial. If the defendant continues to make such demands and the complainant is compelled to comply with the same, the complainant will lose all the benefit of this test case.

The complainant is willing to comply with all the

terms that may be imposed by this Court in order to secure any or all of the relief prayed for either in the original bill of complaint or in the supplemental bill of complaint.

Wherefore, your deponent respectfully prays for the relief asked for in the original bill of complaint and in the supplemental bill of complaint.

SWORN TO BEFORE ME THIS)

24th DAY OF JUNE, 1939.)

John J. Kane

G. M. MONAHAN
NOTARY PUBLIC, NEW YORK COUNTY
N. Y. CO. CLK'S NO. 206, REG. NO. 0-M-78
CERTIFICATES FILED IN
BRONX CO. CLK'S NO. 20, REG. NO. 34-M-20
KINGS CO. CLK'S NO. 176, REG. NO. 279
QUEENS CO. CLK'S NO. 294, REG. NO. 1836
RICHMOND AND WESTCHESTER COUNTIES
COMMISSION EXPIRES MARCH 30, 1940



IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

KING FEATURES SYNDICATE, INC.,
a corporation,
235 East 45th Street,
New York, New York.

Plaintiff,

-against-

CLEMENT L. BOUVE,
as Register of Copyrights,
Library of Congress,

Defendant.

Filed 7/5/39
Civil #540

STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

WARD GREENE, being duly sworn, deposes and
says:-

That he is the Vice-President of the above
named plaintiff.

That of the items identified in plaintiff's
supplemental complaint as Exhibits A, B, C, D, so much
thereof as is referred to in Paragraph TWENTY-FIRST of the
said complaint is comprised within the four following enumer-
ated features:-

Little Miss Muffet
Skippy
Henry
King of the Royal Mounted

That the separate items referred to in Para-
graph TWENTY-FIRST of said supplement complaint are but
four hundred forty-two in number.

That the total number of items, constituting
the subject matter of said demands, is three thousand five
hundred sixty three.

That, at the time the two complete copies of
composite works, referred to in Paragraphs FOURTH, FIFTH,
SIXTH and NINTH (except as to the two specifically designated

volumes in Paragraph NINTH) of the supplemental complaint herein, were deposited in the mail addressed to the Register of Copyrights, Washington, D. C., as copyright deposits, they were in each and every case the only extant editions of the respective works upon which copyright had been secured by first publication thereof with notice of copyright affixed.

That each and every item listed in Exhibits B and C of said supplemental complaint herein was included in said composite works in volume form with the exception of those few and unsubstantial items referred to in Paragraph TWENTY-FIRST of said complaint.

At the time of the deposit of two complete copies of each of the said composite works, which works contained the entire subject matter of said exhibits, except as aforestated, no one of the items listed in said Exhibits B and C had been published, by authority of King Features Syndicate, Inc. in any newspaper or periodical or the like.

That the defendant herein has rejected and refused to accept, as set forth in defendant's letter to plaintiff, dated June 28th, 1939 - a true copy of which letter is annexed hereto and made a part hereof, as Exhibit A-1, the deposit of ^{those} / copies, the filing of ^{those} / applications for copyright registration and the payment of the fees therefor, as more particularly referred to in Paragraph EIGHTH of the supplemental complaint and as to the two volumes designated in Paragraph NINTH thereof.

Every one of the volumes or composite works mentioned herein and every one of the volumes or composite works mentioned in the supplemental bill of

June 28, 1939.

complaint which I have verified, consisted of illustrations and text and each said volumes or composite works contained the separate contributions of more than ten authors.

SWORN TO BEFORE ME THIS)
29th day of June, 1939.)

C. M. MONAHAN
NOTARY PUBLIC, NEW YORK COUNTY
N. Y. CO. CLK'S NO. 205, REG. NO. O-M-78
CERTIFICATES FILED IN
BRONX CO. CLK'S NO. 20, REG. NO. 34-M-20
KINGS CO. CLK'S NO. 176, REG. NO. 299
QUEENS CO. CLK'S NO. 294, REG. NO. 1636
RICHMOND AND WESTCHESTER COUNTIES
COMMISSION EXPIRES MARCH 30, 1940

Served by mail 7/5/39

October 25, 1937
November 21, 1937
January 7, 1938
January 13, 1938
January 20, 1938
January 27, 1938
February 3, 1938
February 10, 1938
May 18, 1939
May 25, 1939

These so-called volumes contain a number of the proof sheets of contributions to newspapers covered by the demand of April 12, 1938, sent to you demanding deposit together with application for registration in each case of a copy of the newspaper containing such contribution. These so-called volumes contain many additional proofs or contributions to periodicals, other than the contributions demanded, each proof being accompanied by a separate copyright notice.

As to the contributions covered by the demand of April 12, 1938, the material submitted falls within the terms of the demand nor the provisions of Sections 17 and 18 of the Copyright Act, which call for copies of the newspaper in which the contributions are published.

As to the contributions covered by the remaining proof sheets that were submitted to you on May 11, 1938, for the reasons set out at length in the report dated June 14, 1938, I have not been able to locate the same.

As to the contributions covered by the May 11, 1938, illustrated material, the same is being retained for the reasons stated above. One copy of the same is being retained for the reasons stated above. The same is being retained for the reasons stated above.

June 28, 1939.

King Features Syndicate, Inc.,
235 East Forty-fifth Street,
New York, New York.

Gentlemen:

The material, registration of which is requested in fifty of the fifty-nine applications delivered to this office by Mr. Joseph A. Cantrel, as stated to you in my letter of June 24, 1939, has been examined. It consists of proof sheets of matter intended for publication and published in the daily press as contributions to newspapers. They are designated by you in your applications as follows:

"King Features Illustrated Weekly,"				
Volumes I, II, III, IV and V, stamped				
on the cover:				
"	"	"	"	December 23, 1937
"	"	"	"	December 31, 1937
"	"	"	"	January 7, 1938
"	"	"	"	January 13, 1938
"	"	"	"	January 20, 1938
"	"	"	"	January 27, 1938
"	"	"	"	February 3, 1938
"	"	"	"	February 10, 1938
"	"	"	"	May 18, 1939
"	"	"	"	May 25, 1939

These so-called volumes contain a number of the proof sheets of contributions to newspapers covered by the demand of April 12, 1939, sent to you demanding deposit together with application for registration in each case of a copy of the newspaper containing such contribution. These so-called volumes contain many additional proofs of contributions to periodicals, other than the contributions demanded, each proof being accompanied by a separate copyright notice.

As to those contributions covered by the demand of April 12, 1939, the material submitted meets neither the terms of the demand nor the requirements of Sections 12 and 13 of the Copyright Act, which call for copies of the newspapers in which the contributions are published.

As to the contributions represented by the remaining proof sheets thus submitted, registration cannot be made for the reasons set out at length in Copyright Office letters to your legal representative dated February 26, May 12 and May 27 of 1938.

The applications submitted covering the "King Features Illustrated Weekly" material cannot be accepted for the reasons stated above. One copy each of this material is being returned to you under separate cover, the second copy being retained for purposes of office reference to show the reason for the action taken.

One hundred dollars of the sum of \$118.00 received through Mr. Cantrel, which, pending action on the above applications, was temporarily credited to your trust account with this office, is returned herewith in the form of a check on the Treasurer of the United States.

The material designated by you as "King Features Weekly," covered by the remaining nine applications submitted by Mr. Cantrel, is still under examination. You will be promptly informed of the result.

Very truly yours,

Register of Copyrights

cc to McCauley & Henry

Enclosure:

Tr., Check \$100.00

REGISTERED MAIL

Return receipt requested

January 6, 1941

As I do not feel that the question of "composite work" alone is of sufficient importance to take up an appeal, I concur in the limited recommendation expressed by Mr. Godfrey.

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL SHEA.

Re: King Features Syndicate vs. C. L. Bouve,
Register of Copyrights, Equity #540.

Attached hereto is Mr. Godfrey's report of adverse action of the U. S. District Court for the District of Columbia in the above-entitled case.

Three questions are presented in Mr. Godfrey's report, all of which pertain to the administrative acts of the Register of Copyrights in his refusal to issue a certificate of registration of copyright for the material forwarded by the King Features Syndicate. The applicant applied for a writ of mandamus against the Register of Copyrights and the District Court has held that plaintiff's claim of copyright should be registered.

In some respects respects this case is similar to Bouve v. 20th Century-Fox Film Corporation, Special Calendar No. 7741, and now set for argument on January 6, 1941, before the U. S. Court of Appeals for the District of Columbia, but the instant case raises the further question of what is a "composite" work.

Recommendation

The Register of Copyrights and the United States Attorney recommend an appeal.

Mr. Godfrey recommends an appeal pending the decision in Bouve v. 20th Century Fox Film Corporation. If the appeal in that case is unsuccessful, then the appeal in this case to be dropped.

As I do not feel that the question of "composite work" alone is of sufficient importance to take up on appeal, I concur in the limited recommendation expressed by Mr. Godfrey.

New York, New York, Plaintiff,
v. Clement L. Davis, as Register
of Copyrights, Library of Congress -
Civil Action No. 140.

J. F. Mothershead.

Judgment entered December 15, 1940 for plaintiff.

Time for filing notice of appeal expired January 7, 1941.

RECOMMENDATION

The Register of Copyrights recommends an appeal to the Court of Appeals for the District of Columbia.

The United States Attorney, Edward M. Curran, recommends an appeal.

I recommend an appeal of the appeal by the Register of Copyrights as recommended in the caption case entitled "Clement L. Davis, as Register of Copyrights, Library of Congress - Plaintiff, v. J. F. Mothershead, Defendant" in the Court of Appeals for the District of Columbia.

REASONING

(1) Where the Register states as a fact that the work deposited is a collection of page proof contributions to a newspaper, such that compliance with Section 12 of the Act requires the deposit of the copies of the newspaper containing such contributions, any such finding of fact is not aided by the record in the absence of a finding that the Register acted in an arbitrary and capricious manner.

28-99

January 3, 1941

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL SHEA

Re: King Features Syndicate, Inc.,
 A Corporation, 235 East 45th Street,
 New York, New York, Plaintiff,
 v. Clement L. Bouvé, as Register
 of Copyrights, Library of Congress -
 Civil Action Equity No. 540.

TIME LIMITS

Judgment entered December 18, 1940 for plaintiff.

Time for filing notice of appeal expires January 7, 1941.

RECOMMENDATIONS

The Register of Copyrights recommends an appeal to the Court of Appeals for the District of Columbia.

The United States Attorney, Edward M. Curran, recommends an appeal.

I recommend an appeal if the appeal by the Register of Copyrights is successful in the companion case entitled Bouve v. 20th Century-Fox Film Corporation, Special Calendar No. 7741, U. S. Court of Appeals for the District of Columbia.

QUESTIONS

(1) Where the Register finds as a fact that the work deposited is a collection of page proof contributions to a newspaper, such that compliance with Section 12 of the Act requires the deposit of the issues of the newspaper containing such contributions, may such finding of fact be set aside by the court in the absence of a finding that the Register acted in an arbitrary and capricious manner? (Finding 9):

(2) May the payment of separate fees for registration of claim of copyright in each contribution be avoided by the expedient outlined in paragraph 1, wherein the applicant merely binds together a number of "proofs" of contributions to a newspaper and then prepublishes in the form of a book?

(3) Is the work deposited a "composite" work within the meaning of Sections 3 and 5 of the Copyright Act?

STATUTES

The Act of March 4, 1909, C. 320, 35 Stat. 1077, as amended (17 U.S.C.A.) is here involved, and more particularly the following sections thereof, to wit: Sections 5, 9, 10, 12, 53, 54, 55, 59 and 61.

STATEMENT OF FACTS

A

Plaintiff's complaint is based on the refusal of the Register in his letter of October 13, 1938 (Complaint, Exhibit D), to issue a certificate of registration for the material forwarded by the plaintiff with an accompanying letter dated October 8, 1938 (Complaint, Exhibit C).

The Register's letter of October 13, 1938 refers to his previous letters of February 26, 1938, May 12, 1938, and May 27, 1938, as setting forth in detail the reasons for refusal to register (Answer, Exhibits 1, 2 and 3). Briefly, these letters state that the material deposited is page proof contributions to a newspaper and, as such, is not registerable; that one copy of the newspaper first publishing each contribution should be deposited under Section 12 of the Copyright Act instead of the bound volumes actually forwarded by the plaintiff; that a \$2.00 fee should be submitted with each newspaper registration; and that the material deposited is not a "composite" work.

B

On December 13, 1940, the court made its findings of fact and conclusions of law, copies of which are attached hereto. The court did not expressly find that the material submitted for deposit was page proof but found (Finding 9):

* * * The sheets contained within the volumes of "All Illustrated Weekly" and within the volumes of 'Weekly' are printed on one side only; there is an absence of pagination; two grades of paper appear to have been used with respect to the volumes of 'All Illustrated Weekly', those grades being known in the trade as 'coated paper' and 'English finish'; each of the items contained within the said books bears a separate notice of copyright in the name of the plaintiff and most of the items therein have a so-called 'release date' indicated thereon, said release date being the earliest date of newspaper publication, authorized by the plaintiff, of the material; said release dates, with the exception hereinabove noted in Paragraph 7 are all subsequent to the first or copyright-initiating publication of the said books; 'printer's directions' appear to be contained on some of the pages of the Weekly. Nonetheless, the said pages have been selected, brought and bound together in the form of, and as, books.

In neither of the findings of fact nor the conclusions of law did the court specifically state that the action of the Register was arbitrary and capricious. In paragraph 11 of the Conclusions of Law, it did say:

11. The defendant, as Register of Copyrights, has no power to refuse or deny registration of a claim of copyright which is entitled to registration under the Copyright Act. Whether an applicant or claimant has complied with the law so that his claim is entitled to be registered raise questions of fact and law to be decided by the Court; the Register of Copyrights has no power to decide such questions, especially where the deposit of copies and the application filed, when read together as they should be, are in apparent compliance with the Act. In any event, findings of fact and conclusions of law made by the Register of Copyrights may be reviewed by the Court, and they are neither conclusive nor binding upon the Court, and such findings and conclusions, if erroneous, may be rectified by this Court.

ARGUMENT

(1) This case is similar to Bouve v. 20th Century-Fox Film Corporation, Special Calendar No. 7741, now set for argument in the U. S. Court of Appeals for the District of Columbia on January 6, 1941. In both cases there is the question of the powers of the Register and, in particular, whether page proof contributions to a newspaper must be received by the Copyright Office for deposit under Section 12 of the Copyright Act and certificates of registration issued therefor.

(2) In the instant case there is the additional point of whether the material deposited is a "composite" work and, if not, must the Register issue a certificate therefor.

The term "composite" work is nowhere defined in the Act. It is, however, defined in a number of early cases as such a work as involves selection and arrangement to which authorship may be attributed. See Lawrence v. Dana, Fed. Case No. 8136 (C.C.D. Mass. 1869), where the Court said (15 Fed. Cas. pp. 57-58):

Copyright may justly be claimed by an author of a book who has taken existing material from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that, in doing so, he has exercised skill and discretion in making the selections, arrangement and combination, and having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement, as provided in the Copyright Act. * * * *
Books "made and composed" in the manner are the proper subjects of copyright; and the author of such book has as much right in his plan, arrangement and combination of materials collected and presented as he has in his thoughts, sentiments, reflections and opinions, or in the modes in which they are therein expressed and illustrated. * * *

Consider also Emerson v. Davies, Fed. Case No. 4436 (C.C.D. Mass. 1845); Gray v. Russell, Fed. Case No. 5728 (C.C.D. Mass. 1839); Atwill v. Ferrett, Fed. Case No. 640 (C.C.S.D. N. Y. 1846); Weil on Copyright Law, pages 178-179.

No case has been located which directly supports the finding of the Register that the work in question is not a "composite" work. The position of the Register is that the arrangement of the material in issue is not the result of intellectual effort but merely represents a haphazard aggregation

of sheets of page proof with no other plan than their chronological appearance in the newspapers in which they were intended to be published, - and hence, not a composite work.

A case somewhat in point, upon which the Register relies, is Banks Law Publishing Co. v. Lawyers Cooperative Publishing Co., 169 Fed. 386 (C.C.A. (2d), 1909). The Court of Appeals quoted the trial judge as follows:

It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing), and paging the volumes - things essential to be done to produce the volumes - are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter.

The Court of Appeals then stated:

We concur with Judge Hazel in his reasoning and conclusion that the arrangement of reported cases in sequence, and paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.

Consider also West Publishing Co. v. Edward Thompson Co., 176 Fed. 833 (C.C.A. (2d), 1910). The Court there found that the mere aggregation of the weekly law reports, which had been separately copyrighted, into volumes did not create a new work which required a new copyright.

A case upon which the plaintiff relies is Fleischer Studios, Inc., et al. v. Freundlich, Inc., et al., 73 Fed. (2d) 276 (C.C.A. (2d), 1934). The Court here held that the mere assembling, in bound leaf form, of a series of unconnected poses of a cartoon character, without story or continuity, constitutes a book, but that it was not a "literary, musical or dramatic work" within the meaning of Section 13 of the Act, which requires that the copyright notice for such literary work shall include the year date.

(3) The District Court in the case at bar said in its conclusions of law (paragraph 3) that the material is a "composite" work. It also found in Finding 9 that the "pages have

been selected, brought and bound together in the form of, and as, books".

It is extremely unlikely that the Court of Appeals would change these findings.

CONCLUSION

An appeal is recommended pending the decision in Bouve v. 20th Century-Fox Film Corporation, supra. If that appeal is unsuccessful, then this appeal should be dropped. The question whether the material deposited is a "composite" work, by itself, does not warrant an appeal.

Respectfully submitted,

Defendant:

H. L. Godfrey.

To the above named Defendant:

You are hereby summoned and required to serve upon

Rebecca Joseph A. Cantrell and
Alfred H. Maceraton

plaintiff's attorney, whose address

is 720 15th Street, N. E., Washington, D. C.

an answer to the complaint which is herewith served upon you, within

days after service of this

summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be entered

against you for the relief demanded in the complaint.

District Court of the United States

Subscribed and sworn to before me

FOR THE

DISTRICT OF Columbia

DIVISION

CIVIL ACTION FILE No.

King Features Syndicate, Inc.

Plaintiff

SUMMONS

I received the within summons v.

I hereby certify and return that on the
Clement L. Bouve, as Register of Copyrights,
Library of Congress.

Defendant

To the above named Defendant :

You are hereby summoned and required to serve upon Messrs Joseph A. Cantrel and
Alfred H. Wasserstrom

plaintiff's attorney, whose address is 729 15th, Street, N. W., Washington, D. C.

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CHARLES E. STEWART

Clerk of Court.

By

Deputy Clerk.

Date:

November 2nd, 1938.

[Seal of Court]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

King Features Syndicate, Inc.,
A corporation,
235 East 45th Street,
New York, New York.

Plaintiff,

v.

Clement L. Bouve,
as Register of Copyrights,
Library of Congress,

Defendant.

Civil Action

Equity No. 540

COMPLAINT FOR INJUNCTION AND
DECLARATORY JUDGMENT.

The complaint of King Features Syndicate, Inc.,
respectfully shows to the Court as follows:

1. That the plaintiff is a corporation organized
under the laws of the State of New York, and files this
complaint in its own right.

2. That the defendant, Clement L. Bouve, is a
citizen of the United States, a resident of the State of
Maryland, and is the duly appointed, qualified and acting
Register of Copyrights, Library of Congress, maintaining his
office in the District of Columbia, and is sued herein in
his official and representative capacity.

3. The action herein arises under the Copyright
Laws of the United States, being the Act of March 4, 1909,
as amended (35 Stat. L., Pt. 1, pp. 1075-1088), as herein-
after more fully appears.

4. That the statute referred to in the preceding
paragraph, Chapter 320, Section 9 thereof, provides as
follows:

"That any person entitled thereto by this Act
may secure copyright for his work by publication
thereof with the notice of copyright required by
this Act; and such notice shall be affixed to each
copy thereof published or offered for sale in the

United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under Section twenty-one of this Act."

5. That on the 6th day of October, 1938 the plaintiff first published copies of volumes I, II, III, IV and V of composite work entitled "King Features Illustrated Weekly" by the offering for sale and the actual sale of said copies in the United States, each of said copies of said volumes having affixed and applied thereto upon the title page thereof the following notice of copyright: "Copyright 1938 in the United States of America by King Features Syndicate, Inc.".

6. That on the date last mentioned the plaintiff first published copies of composite work entitled "King Features Weekly" by the offering for sale and the actual sale thereof in the United States, each of said copies having affixed and applied thereto upon the title page thereof the following notice of copyright: "Copyright 1938 in the United States of America by King Features Syndicate, Inc.".

Photostatic copies of contracts of sale pursuant to which said copies of works, hereinabove referred to in Paragraphs 5 and 6 hereof, were first sold by plaintiff in the United States of America are annexed hereto and made a part hereof and marked Exhibits A1, A2 and A3. Copies of said works hereinabove mentioned are too bulky for enclosure herein as exhibits, but are ready and available and will be offered at the time of the trial of the issues involved herein or at any hearing in this proceeding.

7. That upon information and belief plaintiff avers that on the 7th day of October, 1938 at the request

of the plaintiff said copies of the said works were further publicly exhibited, exposed and offered to the public for resale by the purchasers thereof, hereinabove referred to in Paragraphs 5 and 6 hereof. Photostatic copies of statements of said exhibition, exposure and offering to the public for resale of said copies of said works by said purchasers thereof are annexed hereto and made a part hereof and marked Exhibits B1, B2 and B3.

8. That the said statute further provides in Chapter 320, Section 12 thereof, as amended by the Act of March 28th, 1914, 38 Stat. L., Pt. I, P. 311 as follows:-

"That after copyright has been secured by publication of the work with the notice of copyright as provided in Section nine of this Act, there shall be promptly deposited in the Copyright Office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, **** which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in Section fifteen of this Act; ****, such copies or copy, **** to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

9. That the said statute further provides in Chapter 320, Section 10 thereof, as follows:

"That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in Section fifty-five of this Act."

10. Plaintiff avers that all copies of said works have been duly produced in compliance with the requirements pertaining thereto of Section fifteen of the said statute.

11. That on the 8th day of October, 1938 pursuant to said Section twelve plaintiff deposited in the mails addressed to the register of copyrights, Washington, District

of Columbia, two complete copies of the best edition then published of the works hereinabove referred to in Paragraphs 5 and 6 hereof, said copies so deposited being accompanied in each case by a claim of copyright thereto on behalf of plaintiff.

12. That on the last mentioned date plaintiff duly applied for registration of its said claims to copyright in and to each of said volumes of said work, hereinabove referred to in Paragraph 5 hereof, and of its said claim to copyright in and to said work, hereinabove referred to in Paragraph 6 hereof, by completing, executing and depositing in the mails, addressed to the defendant, application forms therefor, the same being form A1 of the Copyright Office forms, and plaintiff accompanied each of said applications for registration of its said claims to copyright with the due tender of payment of the sum of Two Dollars (\$2.00) in good and lawful currency of the United States as the fee prescribed in Section sixty-one of the statute to effect each registration and to secure the certificate of registration as provided for in Section fifty-five of the said statute. That plaintiff's said applications and tender of said fees were contained in letter from plaintiff to defendant dated October 8th, 1938, a photostatic copy of which is annexed hereto and made a part hereof and marked Exhibit C.

✓ 13. That on the 13th day of October, 1938, the defendant acknowledged receipt of the applications for registration hereinabove referred to in Paragraph 12 and of the deposit of said copies, hereinabove referred to in Paragraph 11 hereof. That the defendant on the last mentioned date rejected said applications for registration and refused and continues to refuse the registrations

applied for. That the defendant's acknowledgement of receipt of said applications for registration and of said deposit of copies together with defendant's rejection of said applications were embodied in letter from defendant to plaintiff dated October 13th, 1938, a photostatic copy of which letter is annexed hereto and made a part hereof and marked Exhibit D.

14. That the plaintiff has duly complied with all the provisions of the aforesaid Copyright Laws applicable hereto including specifically all the requirements set forth in Sections nine, twelve, fifteen, sixteen, eighteen, nineteen, and sixty-one of the said laws and the rules and regulations promulgated thereunder in respect of registration of claims to copyright.

15. That the plaintiff avers that it is the proprietor of the copyrights in and to the aforesaid works and that it has a clear right and is entitled, under said Copyright Laws, to obtain registration of its said claims to copyright, pursuant to Section ten of the said statute and to obtain certificates of said registration pursuant to Section fifty-five of the said statute.

16. That the said action of the defendant in rejecting said applications for registration and in refusing to make said registrations and to issue certificates thereof is arbitrary, unwarranted and contrary to the provisions of the aforesaid Copyright Laws, and defendant's said refusal has caused and will continue to cause plaintiff substantial damage in depriving it of the rights to which it is entitled under the provisions of the said Copyright Laws and is preventing the plaintiff from obtaining the protection, benefits and privileges to which it is entitled under said Laws.

17. That the plaintiff avers that there is an actual controversy involved in the issue herein; that the plaintiff has a substantial interest in a judicial determination thereof; that the plaintiff, therefore, asks for a declaration in its favor of its alleged rights and the co-relative duty of the defendant under the aforesaid Copyright Laws pursuant to the Declaratory Judgment Act of the Judicial Code, Section 274 (d) (28 U.S.C.A. Sec. 400)

18. Plaintiff avers that it has no other plain, adequate or complete remedy except as hereinafter prayed for.

WHEREFORE, the plaintiff prays that this Court adjudge and decree:-

1. That the defendant be directed to register plaintiff's aforesaid claims to copyright as applied for herein and issue to the plaintiff, as the claimant of the copyrights herein, certificates of registration under seal of the Copyright Office upon payment to the defendant, for each such registration together with the corresponding certificate thereof, of the aforesaid fee, as hereinabove referred to in Paragraph 12; or

2. That the defendant be perpetually restrained and enjoined from refusing to register each of plaintiff's aforesaid claims to copyright as applied for herein and from refusing to issue to the plaintiff, as the claimant of the copyrights herein, a certificate thereof for each such registration upon payment of aforesaid fee; or

3. A declaration in favor of the plaintiff of its rights, in the premises and under said Copyright Laws, to obtain registrations of its aforesaid claims to copyright as applied for herein and to the certificates of registration of its aforesaid claims to copyright under seal of the

4. For such other and further relief as this case may require and which to the Court may seem just and proper.

KING FEATURES SYNDICATE, INC.

By (Signed) Ward Greene

Joseph A. Cantrel
Joseph A. Cantrel

(Signed) Alfred H. Wasserstrom
Alfred H. Wasserstrom

Attorneys for Plaintiff,
729 Fifteenth Street, N.W.,
Washington, D. C.

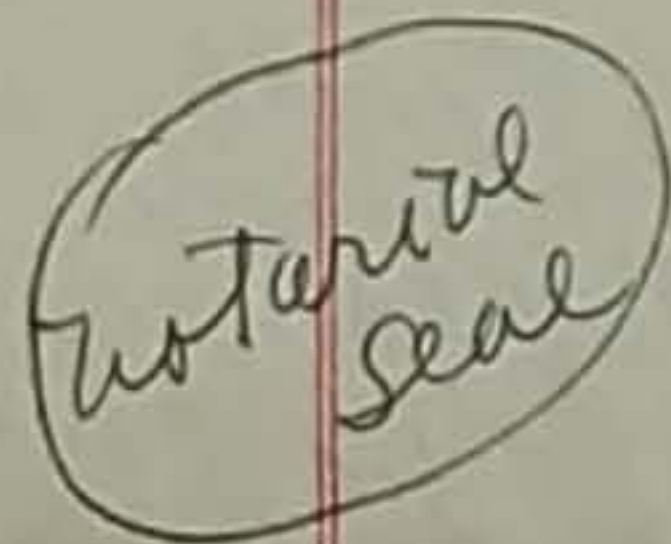
COUNTY OF NEW YORK: ss:

Ward Greene, being first duly sworn upon oath deposes and says that he is the Vice-President of King Features Syndicate, Inc., the plaintiff in the above entitled cause; that he has subscribed the same and has knowledge of the contents thereof; that the matters and things therein stated as of his own knowledge are true and the matters and things stated upon information and belief he believes to be true.

(Signed) Ward Greene

SUBSCRIBED AND SWORN TO before me this 31st day
of October, 1938.

(Signed) Leo Rae Axtell
Notary Public



OPINION OF THE COURT

The Court (O'Donoghue, J.). In the case of King Features Syndicate vs. Bouve, Civil Action No. 540, the Court finds the facts to be substantially as contended for by the plaintiff, and the Court also finds the law to be as contended for by the plaintiff.

Accordingly, the attorney for the plaintiff will prepare findings of fact, conclusions of law, and a draft of a final determination in the case.

Counsel for both sides will get their exhibits, respectively, from the Clerk of the Court.

The United States Attorney, Edward H. Cavan, recommends an appeal.

I recommend an appeal of the appeal by the Register of Copyrights in the suspension case entitled King vs. 27th Century Film Corporation, Special Calendar No. 743, U. S. Court of Appeals for the District of Columbia.

QUESTIONS

(1) Where the Register finds as a fact that the work deposited is a collection of page proof contributions to a newspaper, such that compliance with Section 12 of the Act requires the deposit of the leaves of the newspaper containing such contributions, may such finding of fact be set aside by the court in the absence of a finding that the Register acted in an arbitrary and capricious manner?

28-99

January 3, 1941

(2) May the payment of fees for registration of claim of copyright in such contribution be avoided by the expedient outlined in paragraph 1, wherein the applicant merely binds together a number of "proofs" of contributions to a newspaper and then prepublicates in the form of a book?

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL SHEA

(3) Is the work deposited a "composite" work within the meaning of Section 12 of the Copyright Act of 1909?

Re: King Features Syndicate, Inc.,
A Corporation, 235 East 45th Street,
New York, New York, Plaintiff,
v. Clement L. Bouvé, as Register
of Copyrights, Library of Congress -
Civil Action Equity No. 540.

The following sections thereof, to wit: Sections 3, 9, 10, 12, 53, 54, 55, 59 and 61.

TIME LIMITS

Judgment entered December 18, 1940 for plaintiff.

Time for filing notice of appeal expires January 7, 1941.

Plaintiff's complaint is based on the refusal of the Register in his letter of February 26, 1938, May 12, 1938, and May 27, 1938, to issue a certificate of registration for the material forwarded by the plaintiff. The Register of Copyrights recommends an appeal to the Court of Appeals for the District of Columbia.

The United States Attorney, Edward M. Curran, recommends an appeal.

I recommend an appeal if the appeal by the Register of Copyrights is successful in the companion case entitled Bouve v. 20th Century-Fox Film Corporation, Special Calendar No. 7741, now pending under Section 12 of the Copyright Act instead of the bound volumes actually forwarded by the plaintiff; that a \$2.00 fee should be submitted with each newspaper registration and that the material deposited is not a "composite" work.

QUESTIONS

(1) Where the Register finds as a fact that the work deposited is a collection of page proof contributions to a newspaper, such that compliance with Section 12 of the Act requires the deposit of the issues of the newspaper containing such contributions, may such finding of fact be set aside by the court in the absence of a finding that the Register acted in an arbitrary and capricious manner? (Finding 9):

(2) May the payment of separate fees for registration of claim of copyright in each contribution be avoided by the expedient outlined in paragraph 1, wherein the applicant merely binds together a number of "proofs" of contributions to a newspaper and then prepublishes in the form of a book?

(3) Is the work deposited a "composite" work within the meaning of Sections 3 and 5 of the Copyright Act?

STATUTES

The Act of March 4, 1909, C. 320, 35 Stat. 1077, as amended (17 U.S.C.A.) is here involved, and more particularly the following sections thereof, to wit: Sections 5, 9, 10, 12, 53, 54, 55, 59 and 61.

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On December 18, 1940, the court made its findings of fact and conclusions of law, copies of which are attached hereto. The court did not expressly find that the material submitted for deposit was page proof but found (Finding 9):

* * * The sheets contained within the volumes of "All Illustrated Weekly" and within the volumes of 'Weekly' are printed on one side only; there is an absence of pagination; two grades of paper appear to have been used with respect to the volumes of 'All Illustrated Weekly', those grades being known in the trade as 'coated paper' and 'English finish'; each of the items contained within the said books bears a separate notice of copyright in the name of the plaintiff and most of the items therein have a so-called 'release date' indicated thereon, said release date being the earliest date of newspaper publication, authorized by the plaintiff, of the material; said release dates, with the exception hereinabove noted in Paragraph 7 are all subsequent to the first or copyright-initiating publication of the said books; 'printer's directions' appear to be contained on some of the pages of the Weekly. Nonetheless, the said pages have been selected, brought and bound together in the form of, and as, books.

In neither of the findings of fact nor the conclusions of law did the court specifically state that the action of the Register was arbitrary and capricious. In paragraph 11 of the Conclusions of Law, it did say:

11. The defendant, as Register of Copyrights, has no power to refuse or deny registration of a claim of copyright which is entitled to registration under the Copyright Act. Whether an applicant or claimant has complied with the law so that his claim is entitled to be registered raise questions of fact and law to be decided by the Court; the Register of Copyrights has no power to decide such questions, especially where the deposit of copies and the application filed, when read together as they should be, are in apparent compliance with the Act. In any event, findings of fact and conclusions of law made by the Register of Copyrights may be reviewed by the Court, and they are neither conclusive nor binding upon the Court, and such findings and conclusions, if erroneous, may be rectified by this Court.

which directly supports the finding of the Register that the work in question is not a "compilation" work. The position of the Register is that the arrangement of the material in issue is not the result of an intellectual effort but merely represents a haphazard aggregation

ARGUMENT

(1) This case is similar to Bouve v. 20th Century-Fox Film Corporation, Special Calendar No. 7741, now set for argument in the U. S. Court of Appeals for the District of Columbia on January 6, 1941. In both cases there is the question of the powers of the Register and, in particular, whether page proof contributions to a newspaper must be received by the Copyright Office for deposit under Section 12 of the Copyright Act and certificates of registration issued therefor.

(2) In the instant case there is the additional point of whether the material deposited is a "composite" work and, if not, must the Register issue a certificate therefor.

The term "composite" work is nowhere defined in the Act. It is, however, defined in a number of early cases as such a work as involves selection and arrangement to which authorship may be attributed. See Lawrence v. Dana, Fed. Case No. 8136 (C.C.D. Mass. 1869), where the Court said (15 Fed. Cas. pp. 57-58):

Copyright may justly be claimed by an author of a book who has taken existing material from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that, in doing so, he has exercised skill and discretion in making the selections, arrangement and combination, and having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement, as provided in the Copyright Act. * * * *
Books "made and composed" in the manner are the proper subjects of copyright; and the author of such book has as much right in his plan, arrangement and combination of materials collected and presented as he has in his thoughts, sentiments, reflections and opinions, or in the modes in which they are therein expressed and illustrated. * * *

Consider also Emerson v. Davies, Fed. Case No. 4436 (C.C.D. Mass. 1845); Gray v. Russell, Fed. Case No. 5728 (C.C.D. Mass. 1839); Atwill v. Ferrett, Fed. Case No. 640 (C.C.S.D. N. Y. 1846); Weil on Copyright Law, pages 178-179.

No case has been located which directly supports the finding of the Register that the work in question is not a "composite" work. The position of the Register is that the arrangement of the material in issue is not the result of intellectual effort but merely represents a haphazard aggregation

of sheets of page proof with no other plan than their chronological appearance in the newspapers in which they were intended to be published, - and hence, not a composite work.

A case somewhat in point, upon which the Register relies, is Banks Law Publishing Co. v. Lawyers Cooperative Publishing Co., 169 Fed. 336 (C.C.A. (2d), 1909). The Court of Appeals quoted the trial judge as follows:

It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing), and paging the volumes - things essential to be done to produce the volumes - are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter.

The Court of Appeals then stated:

We concur with Judge Hazel in his reasoning and conclusion that the arrangement of reported cases in sequence, and paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details.

Consider also West Publishing Co. v. Edward Thompson Co., 176 Fed. 833 (C.C.A. (2d), 1910). The Court there found that the mere aggregation of the weekly law reports, which had been separately copyrighted, into volumes did not create a new work which required a new copyright.

A case upon which the plaintiff relies is Fleischer Studios, Inc., et al. v. Freundlich, Inc., et al., 73 Fed. (2d) 276 (C.C.A. (2d), 1934). The Court here held that the mere assembling, in bound leaf form, of a series of unconnected poses of a cartoon character, without story or continuity, constitutes a book, but that it was not a "literary, musical or dramatic work" within the meaning of Section 18 of the Act, which requires that the copyright notice for such literary work shall include the year date.

(3) The District Court in the case at bar said in its conclusions of law (paragraph 3) that the material is a "composite" work. It also found in Finding 9 that the "pages have

been selected, brought and bound together in the form of, and as, books".

It is extremely unlikely that the Court of Appeals would change these findings.

Defendant.

CONCLUSION

An appeal is recommended pending the decision in Bouve v. 20th Century-Fox Film Corporation, supra. If that appeal is unsuccessful, then this appeal should be dropped. The question whether the material deposited is a "composite" work, by itself, does not warrant an appeal.

STATEMENT

Bill for mandatory injunction to compel defendant, as Register of Copyrights, to register plaintiff's claims to copyright in respect of certain weekly publications by the plaintiff, and for declaratory judgment fixing and determining plaintiff's rights in respect of the same. **Respectfully submitted,** Plaintiff maintains that it has complied with the provisions of the copyright laws of the United States, so as to entitle it to the registration herein applied for, and that the defendant has refused to register the claims to copyright. Plaintiff claims that defendant, pursuant to the law, does not have a discretion to refuse to register a copyright claim if good on its face, and **H. L. Godfrey**, even assuming, arguendo, he does have such a right, that he acted wrongfully and arbitrarily in respect to the present applications. Defendant maintains that he has a discretion to determine whether or not the plaintiff has complied with the law, and that such discretion may not be reviewed insofar as any finding of fact is concerned, but only in the event the Court determines that the exercise of such discretion was arbitrary and capricious. More particularly it is claimed by the defendant that thirteen certain issues presented on the paper filed herewith are before the Court at this hearing, none of these issues being relinquished by the defendant at this pretrial. The plaintiff does not acquiesce in this view.

STIPULATIONS:

At pre-trial, parties stipulate that the findings of fact and conclusions of law which shall be made by the Court in respect of the original complaint herein shall apply with like force to the supplemental complaint filed herein, and without necessity of formal proof with respect to such supplemental complaint; defendant, however, reserving the right, notwithstanding this stipulation, to offer evidence with respect to any practice of the plaintiff concerning attempts at publication of the material referred to in the supplemental complaint; in this connection, plaintiff also reserves the right to offer evidence as to practices of the Register of Copyrights and his predecessors in the matter of acting upon applications of the nature of those herein involved, and the acceptance of deposits offered by this plaintiff and others. No stipulation herein made with respect to the original and supplemental complaint shall be construed as raising any new issues not heretofore covered by the pleadings.

Counsel for defendant will notify counsel for plaintiff, within five days whether he will require the issue #12 to be determined in this cause (referred to in the attached statements of issues to be determined at the trial), or whether it will be withdrawn and admitted to be in compliance with the provisions of Sections 15 and 16 of the copyright Act. Plaintiff does not hereby acknowledge or recognize that such an issue is properly raised by the pleadings in this case.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

KING FEATURES, INC.,

Plaintiff

vs.

BOUVE,

Defendant.

Calendar No. 2415

Civil Action No. 540

PRETRIAL PROCEEDINGS

STATEMENT OF NATURE OF CASE:

Bill for mandatory injunction to compel defendant, as Register of Copyrights, to register plaintiff's claims to copyright in respect of certain weekly publications by the plaintiff, and for declaratory judgment fixing and determining plaintiffs rights in respect to said publications. Plaintiff maintains that it has complied with the provisions of the copyright laws of the United States, so as to entitle it to the registrations herein applied for, and that the defendant has refused to register the claims to copyright. Plaintiff claims that defendant, pursuant to the law, does not have a discretion to refuse to register a copyright claim if good on its face, and further, that even assuming, arguendo, he does have such a right, that he acted wrongfully and arbitrarily in respect to the present applications. Defendant maintains that he has a discretion to determine whether or not the plaintiff has complied with the law, and that such discretion may not be reviewed insofar as any finding of fact is concerned, but only in the event the Court determines that the exercise of such discretion was arbitrary and capricious. More particularly it is claimed by the defendant that thirteen certain issues presented on the paper filed herewith are before the Court at this hearing, none of these issues being relinquished by the defendant at this pretrial. The plaintiff does not acquiesce in this view.

STIPULATIONS:

At pre-trial, parties stipulate that the findings of fact and conclusions of law which shall be made by the Court in respect of the original complaint herein shall apply with like force to the supplemental complaint filed herein, and without necessity of formal proof with respect to such supplemental complaint; defendant, however, reserving the right, notwithstanding this stipulation, to offer evidence with respect to any practice of the plaintiff concerning attempts at publication of the material referred to in the supplemental complaint; in this connection, plaintiff also reserves the right to offer evidence as to practices of the Register of Copyrights and his predecessors in the matter of acting upon applications of the nature of those herein involved, and the acceptance of deposits offered by this plaintiff and others. No stipulation herein made with respect to the original and supplemental complaint shall be construed as raising any new issues not heretofore covered by the pleadings.

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KING FEATURES INC. v. BOUVE

Cal. No. 2415
C. A. No. 540

STIPULATIONS: (CONT'D.)

Parties stipulate that certain documents, bearing initials of the Court, represent the publications referred to in these proceedings, and that said publications may be received in evidence without formal proof, exclusive of any notes in pencil or pen appearing therein.

Defendant's counsel will supply to plaintiff's counsel within three days a list of newspapers and dates of publication of these newspapers, in which he claims certain articles referred to in the exhibits heretofore identified appeared, and that the separate articles were sent to the newspapers by the plaintiff. Plaintiff's counsel thereupon will endeavor to inform defendant's counsel at least within five days thereafter whether he will stipulate with respect to authenticity of such publications and whether he will stipulate that they were sent to the newspapers by the plaintiff for such publication.

Any stipulations hereinabove made or hereafter made by and between the parties as contemplated by these pre-trial proceedings, are entered into with reservations of rights on part of each side to object to such documents, papers or other evidence on grounds of relevancy, materiality or competency.

Dated May 13, 1940

Pretrial Justice.

REMARKS of Pretrial Justice for consideration of Trial Justice:

Attorneys authorized to act:

ALFRED H. WASSERSTROM
J. A. CANTREL

Plaintiff

H. L. GODFREY

Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

KING FEATURES SYNDICATE, INC.,

A Corporation,
235 East 45th Street,
New York, New York,

Plaintiff,

vs.

CLEMENT L. BOUVE,

as Register of Copyrights,
Library of Congress,

Defendant.

Civil Action No. 540.

The above entitled action, having been duly commenced by the filing in the Office of the Clerk of the Court, of the complaint herein for injunction and declaratory judgment and by the service of subpoena and copy of said complaint on the above named defendant (copies of said complaint having been also duly served upon the United States Attorney for the District of Columbia and upon the Attorney General of the United States) and the defendant having duly appeared herein in answer to the complaint and a supplemental complaint having been thereafter duly filed and served herein upon said defendant pursuant to order thereof of this Court and the defendant having answered said supplemental complaint, and the issues thus joined having duly come on to be tried before the undersigned District Justice and said issues having been tried at a term of this Court on the 23rd and 24th days of October, 1940 and the parties hereto having appeared at said trial by their respective attorneys and having adduced their proof before the undersigned District Justice,

I DECIDE AND FIND AS FOLLOWS:

FINDINGS OF FACT

1. That the plaintiff, King Features Syndicate, Inc., is a corporation organized and existing under the laws of the State of New York.

2. That the plaintiff is and was at all times hereinafter mentioned, the proprietor of the copyrights in and to the following books, including all the copyrightable material therein contained, entitled (a) "King Features Illustrated Weekly" Volumes I, II, III, IV and V thereof, hereinafter collectively referred to as "All Illustrated Weekly" and "King Features Illustrated Weekly" Volumes I, II, III and IV thereof, hereinafter collectively referred to as "Illustrated Weekly" and (b) "King Features Weekly" hereinafter referred to as "Weekly", the separate numbers, issues or editions thereof, respectively, are hereinafter identified alphabetically according to their correspondingly hereinafter indicated dates of publication:-

	<u>Date of Publication.</u>
A. All Illustrated Weekly and Weekly	10/6/38
B. Illustrated Weekly, Vols. I,II,III,IV	12/30/37
C. " " " " " " " "	1/6/38
D. " " " " " " " "	1/13/38
E. " " " " " " " "	1/20/38
F. " " " " " " " "	1/27/38
G. " " " " " " " "	2/3/38
H. " " " " " " " "	2/10/38
I. " " Vols. I,II,III,IV and Weekly	12/29/38
J. " " " " " " " "	1/5/39
K. " " " " " " " "	1/12/39
L. " " " " " " " "	1/19/39
M. All Illustrated Weekly and Weekly	1/26/39
N. " " " " " " " "	2/2/39
O. " " " " " " " "	2/9/39
P. " " " " " " " "	2/16/39
Q. " " " " " " " "	2/23/39
R. " " " " " " " "	3/30/39
S. " " " " " " " "	4/6/39
T. " " " " " " " "	4/13/39
U. " " " " " " " "	3/2/39
V. " " " " " " " "	3/9/39
W. " " " " " " " "	3/16/39
X. " " " " " " " "	3/23/39
Y. " " " " " " " "	4/20/39
Z. " " " " " " " "	4/27/39
Al. " " " " " " " "	5/4/39
B1. " " " " " " " "	5/11/39
Cl. " " " " " " " "	5/18/39
D1. " " " " " " " "	5/25/39

3. That said books were each printed in the City of New York from type set within the limits of the United States and the binding thereof was performed within the limits of the United States.

4. That plaintiff first published in the United States the said books, hereinabove identified as A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A1, B1, C1 and D1, on the correspondingly hereinabove set forth respective dates of publication by the first sale of copies thereof and the first offering for sale to the public on the said corresponding respective dates of publication; that all copies of the said books as so first published had affixed and applied thereto upon the title pages thereof the statutory notice of copyright, namely, Copyright (the year of first publication) by King Features Syndicate, Inc.; copies of each said number, issue or edition of the said books so first published were six in number.

5. That on the 8th day of October, 1938 plaintiff deposited in the mail, properly addressed to the Register of Copyrights, Library of Congress, Washington, D.C., two complete copies of the only edition then published of the books entitled "King Features Illustrated Weekly, Volumes I, II, III, IV and V" and "King Features Weekly" which had been first published, as aforesaid, on the 6th day of October, 1938, and plaintiff accompanied said deposit with its claims to copyright in and to each of said books, including the said volumes, that is, plaintiff accompanied said deposit with separate applications for registration of its claims to copyright in and to each of said books (a separate application having been filed by plaintiff for each of the five volumes of King Features Illustrated Weekly and for the one volume of King Features Weekly), said applications being upon form A1 of the forms supplied by the Register of Copyrights and each of which applications included the affidavit as required by Section 16 of the Copyright Act setting forth that said books had been produced in accordance with the "manufacturing provisions" of Section 15 of the said Act, and plaintiff accompanied said applications with the sum of \$12.00 (at the rate of \$2.00 for the

registration of its claims to copyright in and to each of the said six volumes), the same being the statutory fee for (a) the registration of plaintiff's claims of copyright in and to the said books and (b) the issuance to plaintiff of the certificates of said registration.

6. That on the following respective dates the plaintiff deposited in the Copyright Office, Library of Congress, Washington, D.C., or in the mail, properly addressed to the Register of Copyrights, Library of Congress, Washington, D.C., two complete copies of the only complete edition then published of each of the said books hereinabove identified as B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, A1, B1, C1, and D1 and plaintiff accompanied each of said deposits with its claim of copyright in and to each of said books, that is, plaintiff accompanied each of said deposits with separate applications for registration of its claims to copyright in and to each of said books in the manner as more particularly set forth in Paragraph 5 hereof but with respect to the particular separate numbers, issues and editions hereinabove referred to in this Paragraph:

	<u>Deposited</u>		<u>Deposited</u>
B.	6/24/39	Q.	2/25/39
C.	6/24/39	R.	4/1/39
D.	6/24/39	S.	4/8/39
E.	6/24/39	T.	4/15/39
F.	6/24/39	U.	3/4/39
G.	6/24/39	V.	3/11/39
H.	6/24/39	W.	3/18/39
I.	12/31/38	X.	3/25/39
J.	1/7/39	Y.	4/22/39
K.	1/14/39	Z.	4/29/39
L.	1/21/39	A1.	5/6/39
M.	1/28/39	B1.	5/13/39
N.	2/4/39	C1.	6/24/39
O.	2/11/39	D1.	6/24/39
P.	2/18/39		

7. That all of the copyrightable material contained within the said books hereinabove alphabetically identified in Paragraph 2 hereof (with the exception of some few items contained

within one or more of the books) was first published by plaintiff in and as parts of the particular volumes of the said books in which the said material was contained, so that the initial publication of the said material coincides with the initial publication of the volumes of the said books containing the material.

8. That each of the said books contains independent and distinct contributions of various authors and artists in the form of cartoon or comic strips, special articles, etc. All of the contributions contained within each of the volumes of the said books have been brought together and published as a unit.

9. The defendant, as Register of Copyrights, refused to register plaintiff's claims of copyright in and to the said books although the same had been applied for as hereinabove referred to in Paragraphs 5 and 6 and defendant refused to issue the certificates of registration of plaintiff's said claims although the same had likewise been applied for as hereinabove referred to in Paragraphs 5 and 6; that defendant refused to register plaintiff's said claims and to issue said certificates because of certain opinions expressed by defendant in letters addressed to counsel for plaintiff dated February 26, 1938, May 12, 1938, May 27, 1938 and introduced as evidence at the trial of this case, one of which opinions was that the books in question, and the copies thereof deposited as above referred to, consisted of "page proofs" of contributions to newspapers and the defendant contended, therefore, that the newspapers in which the material contained within the said books appeared should be deposited and a separate fee for the registration of each item of such material appearing in such newspapers be paid instead of the deposit of the copies of the said books and the payment of the \$2.00 fee for the registration of plaintiff's claims of copyright to each of the volumes of the said books, as had been done herein by plaintiff. (The sheets contained within the volumes of "All Illustrated Weekly" and within the volumes of 'Weekly' are printed on one side only;

there is an absence of pagination; two grades of paper appear to have been used with respect to the volumes of 'All Illustrated Weekly', those grades being known in the trade as 'coated paper' and 'English finish'; each of the items contained within the said books bears a separate notice of copyright in the name of the plaintiff and most of the items therein have a so-called 'release date' indicated thereon, said release date being the earliest date of newspaper publication, authorized by the plaintiff, of the material; said release dates, with the exception hereinabove noted in Paragraph 7 are all subsequent to the first or copyright-initiating publication of the said books; 'printer's directions' appear to be contained on some of the pages of the Weekly. Nonetheless, the said pages have been selected, brought and bound together in the form of, and as, books.)

10. It had been the practice from June, 1933 until August of the year 1936 under the former Register of Copyrights to register claims of copyright in and to publications similar to and identical with the books entitled King Features Illustrated Weekly and King Features Weekly "as books" when the registration of said claims had been applied for on Copyright Office form Al.

11. That the defendant, as Register of Copyrights, forwarded to the plaintiff four separate written "demands and notices" purporting to be pursuant to Section 13 of the said Act, which "demands and notices" were dated April 12, 1939, April 17, 1939, May 1, 1939 and June 13, 1939; that said "demands and notices" called upon the plaintiff (a) to deposit one copy of any newspaper for each item of plaintiff's material which appeared in such newspaper and (b) to apply for special registration of claims of copyright for each said item; that each item of plaintiff's material referred to in said "demands and notices", with the exceptions noted in Paragraph 7 hereof, had been initially published

by plaintiff in and as a part of the said books; that the items of plaintiff's material referred to in said "demands and notices" appeared in newspapers with authority of plaintiff but only after the initial publication thereof in and as a part of said books, with the exceptions noted in Paragraph 7 hereof.

CONCLUSIONS OF LAW

1. That the plaintiff duly secured its copyright in and to each of the volumes of each of the numbers, issues or editions of the said books entitled King Features Illustrated Weekly and King Features Weekly, hereinabove identified alphabetically in Paragraph 2 of the Findings of Fact herein by the plaintiff's said initial publication thereof in the United States with said notice of copyright affixed or applied to each said volume upon the title page thereof.

2. Each volume of the works entitled King Features Illustrated Weekly and King Features Weekly, hereinabove identified alphabetically in Paragraph 2 of the Findings of Fact herein is a book within the meaning of that term as used in Section 5 of the Copyright Act.

3. Each volume of the works entitled King Features Illustrated Weekly and King Features Weekly, hereinabove identified alphabetically in Paragraph 2 of the Findings of Fact herein is a composite work within the meaning of that term as used in Sections 3 and 5 of the said Act.

4. That the plaintiff duly complied with all the provisions of the Copyright Act in respect of the deposit of copies and the registration of its claims to copyright in and to each of the volumes of the said books entitled King Features Illustrated Weekly and King Features Weekly, as hereinabove identified alphabetically in Paragraph 2 of the said Findings of Fact.

every copyrightable component part thereof.

5. That plaintiff duly complied with all the requirements for the registration of its claims of copyright in and to each of said books and said composite works and plaintiff duly deposited copies thereof in accordance with law, and plaintiff thereupon became entitled to the registration of its claims of copyright in and to each of the said books and to the issuance of certificates of registration thereof for each volume of each of the said books.

6. Specifically the two copies of each of the books deposited by the plaintiff in the Copyright Office or in the mail addressed thereto, as hereinabove referred to and set forth in said Findings of Fact constituted and were complete copies thereof and constituted and were the best editions of the said works then published.

7. That the plaintiff's copyrights in and to the said books or works, secured herein by the initial publication thereof with the prescribed notice of copyright duly affixed thereto, secured to and for the plaintiff copyright in and to each and every copyrightable component part of the said books or works just as if the said parts thereof had been separately published with notice of copyright.

8. By depositing in the Copyright Office or in the mail addressed thereto the two copies of the best editions of the said books then published together with the applications for registration of plaintiff's claims to copyright in and to the said books (the same being on duly completed A-1 Copyright Office forms) accompanied by the payment or tender of the fee of \$2.00 for registration of the said claims for each volume of the said books, all of which the plaintiff properly did herein, the plaintiff complied duly with the requirements of Section 12 of the said Act in respect of not only the said books but also each and every copyrightable component part thereof.

9. That the appearance or publication of certain or all of said component parts in newspapers, with the exceptions noted in Paragraph 7 of the Findings of Fact, the same having taken place under authority of plaintiff subsequent to initial publication of said parts in and as a part of said books, constituted a mere republication of said component parts and the plaintiff, therefore, should not be required to deposit copies of said newspapers or to apply for a special registration in respect of said republished components.

10. The plaintiff having complied with Section 12 of the Act, the said "demands and notices" and each and every part thereof, hereinabove referred to in said Findings of Fact, with the exceptions noted in Paragraph 7 thereof, should be vacated and set aside.

(11. The defendant, as Register of Copyrights, has no power to refuse or deny registration of a claim of copyright which is entitled to registration under the Copyright Act. Whether an applicant or claimant has complied with the law so that his claim is entitled to be registered raise questions of fact and law to be decided by the Court; the Register of Copyrights has not power to decide such questions, especially where the deposit of copies and the application filed, when read together as they should be, are in apparent compliance with the Act. In any event, findings of fact and conclusions of law made by the Register of Copyrights may be reviewed by the Court, and they are neither conclusive nor binding upon the Court, and such findings and conclusions, if erroneous, may be rectified by this Court.)

Daniel W. O'Donoghue
Justice

Dated, December 18th, 1940

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

KING FEATURES SYNDICATE, INC., :
A Corporation, :
235 East 45th Street, :
New York, New York, :

Plaintiff, :

vs. :

Civil Action No. 540.

CLEMENT L. BOUVE, :
as Register of Copyrights, :
Library of Congress, :

Defendant. :

O R D E R.

This cause came on to be heard at this term of court and upon consideration thereof it is this 18th day of December, 1940,

ADJUDGED, ORDERED, and DECREED, (1) That the defendant, Clement L. Bouve, as Register of Copyrights, be and he hereby is enjoined and directed forthwith to register plaintiff's claims of copyright in and to the books entitled "King Features Illustrated Weekly," Volumes I to V inclusive, hereinafter referred to collectively as "Illustrated Weekly" and "King Features Weekly" hereinafter referred to as "Weekly" published by plaintiff on the following dates in accordance with plaintiff's applications for registration of its claims of copyright on Form A-1 of the copyright office forms filed on the following corresponding respective dates, and said defendant be and he hereby is further enjoined and directed to issue to said plaintiff certificates of copyright registration thereof:-

	Date of Publication	Date of Filing
All Illustrated Weekly and Weekly	10/6/38	10/8/38
Illustrated Weekly, Vols. I, II, III, IV.	12/30/37	6/24/39
" " " " " "	1/6/38	6/24/39
" " " " " "	1/13/38	6/24/39
" " " " " "	1/20/38	6/24/39
" " " " " "	1/27/38	6/24/39
" " " " " "	2/3/38	6/24/39
" " " " " "	2/10/38	6/24/39
Illustrated Weekly, Vols. I, II, III, IV and Weekly	12/29/38	12/31/38
Illustrated Weekly, Vols. I, II, III, IV and Weekly	1/5/39	1/7/39
Illustrated Weekly, Vols. I, II, III, IV and Weekly	1/12/39	1/14/39

Provided, however, that this order shall not become

effective until the expiration of the time allowed defendant in

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

KING FEATURES SYNDICATE, INC.,	:		
A Corporation,	:		
235 East 45th Street,	:		
New York, New York,	:		
	:		
Plaintiff,	:		
	:		
vs.	:	Civil Action No. 540.	
	:		
CLEMENT L. BOUVE,	:		
as Register of Copyrights,	:		
Library of Congress,	:		
	:		
Defendant.	:		

O R D E R.

This cause came on to be heard at this term of court and upon consideration thereof it is this 18th day of December, 1940,

ADJUDGED, ORDERED, and DECREED, (1) That the defendant, Clement L. Bouve, as Register of Copyrights, be and he hereby is enjoined and directed forthwith to register plaintiff's claims of copyright in and to the books entitled "King Features Illustrated Weekly," Volumes I to V inclusive, hereinafter referred to collectively as "Illustrated Weekly" and "King Features Weekly" hereinafter referred to as "Weekly" published by plaintiff on the following dates in accordance with plaintiff's applications for registration of its claims of copyright on Form A-1 of the copyright office forms filed on the following corresponding respective dates, and said defendant be and he hereby is further enjoined and directed to issue to said plaintiff certificates of copyright registration thereof:-

	Date of Publication	Date of Filing
All Illustrated Weekly and Weekly	10/6/38	10/8/38
Illustrated Weekly, Vols. I, II, III, IV.	12/30/37	6/24/39
" " " " " "	1/6/38	6/24/39
" " " " " "	1/13/38	6/24/39
" " " " " "	1/20/38	6/24/39
" " " " " "	1/27/38	6/24/39
" " " " " "	2/3/38	6/24/39
" " " " " "	2/10/38	6/24/39
Illustrated Weekly, Vols. I, II, III, IV and Weekly	12/29/38	12/31/38
Illustrated Weekly, Vols. I, II, III, IV and Weekly	1/5/39	1/7/39
Illustrated Weekly, Vols. I, II, III, IV and Weekly	1/12/39	1/14/39

	<u>Date of Publication</u>	<u>Date of Filing</u>
Illustrated Weekly, Vols. I, II, III, IV		
and Weekly	1/19/39	1/21/39
All Illustrated Weekly and Weekly	1/26/39	1/28/39
" " " " "	2/2/39	2/4/39
" " " " "	2/9/39	2/11/39
" " " " "	2/16/39	2/18/39
" " " " "	2/23/39	2/25/39
" " " " "	3/30/39	4/1/39
" " " " "	4/6/39	4/8/39
" " " " "	4/13/39	4/15/39
" " " " "	3/2/39	3/4/39
" " " " "	3/9/39	3/11/39
" " " " "	3/16/39	3/18/39
" " " " "	3/23/39	3/25/39
" " " " "	4/20/39	4/22/39
" " " " "	4/27/39	4/29/39
" " " " "	5/4/39	5/6/39
" " " " "	5/11/39	5/13/39
" " " " "	5/18/39	6/24/39
" " " " "	5/25/39	6/24/39

(2) That the demands and notices and each and every part thereof dated April 12, 1939, April 17, 1939, May 1, 1939 and June 13, 1939, respectively, heretofore made and given by defendant to plaintiff, be and they hereby are vacated and set aside, excepting only as to such items, if any, enumerated in said demands as may have been published in newspapers under authority of plaintiff prior to the initial publication by plaintiff in the United States of the particular volumes of the said books containing such particular items, said exceptions, however, to be designated by the defendant by written notice from the defendant to plaintiff.

(3) That the defendant as Register of Copyrights be and he hereby is perpetually enjoined from enforcing any of said demands or any part thereof, excepting only as to such items, if any, enumerated in any of said demands which may have been published in newspapers under authority of plaintiff prior to the initial publication by plaintiff in the United States of the particular volume of the said books containing such excepted items, said exceptions, however, to be designated by the defendant by written notice thereof from the defendant to the plaintiff and, in the absence of such notice, said demands even as to said excepted items shall in no respect be enforced.

Provided, however, that this Order shall not become effective until the expiration of the time allowed defendant in

which to file notice of appeal or until final disposition of
such appeal.

By the Court:

(Sgd.)

Daniel W. O'Donoghue
Justice.

No objection as to form:

William S. Jarver
Assistant United States Attorney,
Attorney for Defendant.

JOSEPH A. CARTER
ALFRED E. BROWN
ATTORNEYS AT LAW
722 N. WASHINGTON
WASHINGTON, D. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

X- - - - -X

KING FEATURES SYNDICATE, INC.,
a Corporation
235 East 45th Street,
New York, New York,

Plaintiff,

-against-

CLEMENT L. BOUVE,
as Register of Copyrights,
Library of Congress,

Defendant.

X- - - - -X

TRIAL BRIEF AND MEMORANDUM OF LAW
SUBMITTED, FOR AND ON BEHALF OF
THE ABOVE NAMED PLAINTIFF, IN
SUPPORT OF PLAINTIFF'S CAUSES OF ACTION
HEREIN AND FOR THE RELIEF PRAYED FOR
IN ITS ORIGINAL AND SUPPLEMENTAL
COMPLAINTS HEREIN.

JOSEPH A. CANTREL
ALFRED H. WASSERSTROM
Attorneys for Plaintiff
729 Fifteenth Street
Washington, D. C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

-----X
KING FEATURES SYNDICATE, INC., :

a Corporation :

235 East 45th Street, :

New York, New York. :

Plaintiff, :

-against- :

CLEMENT L. BOUVE, :

as Register of Copyrights, :

Library of Congress. :

Civil Action #540

Defendant. :
-----X

TRIAL BRIEF AND MEMORANDUM OF LAW
SUBMITTED, FOR AND ON BEHALF OF
THE ABOVE NAMED PLAINTIFF, IN
SUPPORT OF PLAINTIFF'S CAUSES OF ACTION
HEREIN AND FOR THE RELIEF PRAYED FOR
IN ITS ORIGINAL AND SUPPLEMENTAL
COMPLAINTS HEREIN.

PRELIMINARY STATEMENTS OF
PROCEEDINGS HERETOFORE HAD
HEREIN AND OF THE RELIEF
FOR WHICH PLAINTIFF ASKS HEREIN.

This action was instituted by the plaintiff, on or about the 2nd day of November, 1938, against the defendant in the latter's official capacity of Register of Copyrights. The relief prayed for herein, as set forth in plaintiff's original complaint is as follows:

That this court adjudge and decree:

1. That the defendant be mandatorily enjoined (a) to register plaintiff's claims to copyright as applied for herein and (b) to issue to plaintiff, as the claimant of the copy-

rights herein, certificates of registration thereof upon payment to the defendant of such fees therefor as had been tendered to the defendant by the plaintiff; or

2. That the defendant be perpetually enjoined (a) from refusing to register each of plaintiff's aforesaid claims to copyright as applied for herein and (b) from refusing to issue to plaintiff, as claimant of the copyrights herein, the certificates of registration thereof upon the payment to the defendant of such fees therefor as had been tendered to the defendant by the plaintiff; or

3. A declaration in favor of the plaintiff of its rights, in the premises and under the copyright laws of the United States, (a) to obtain registrations of its aforesaid claims to copyright as herein applied for and (b) to obtain the statutory certificates of registration of such claims; and

4. For such other and further relief as the case may require and which to the court is just.

Issue was thereafter joined herein by the filing and service of the defendant's answer on or about the 4th day of January, 1939.

Thereafter, by reason of facts subsequently occurring (as will more particularly hereinafter appear), leave of this court was granted to the plaintiff to file and serve a supplemental complaint herein. Such supplemental complaint was filed and served herein on or about the 5th day of July, 1939. The relief prayed for in said supplemental complaint is, among other things, as follows:

1. That the defendant be ordered to accept from plaintiff the sum of \$2.00 as a fee for certificate of copyright registration for each of the volumes, referred in said supplemental complaint, heretofore offered for copyright

registration; and the name of plaintiff;

2. That the demands, heretofore served upon plaintiff by defendant under section 13 of the Copyright Act, be, in each instance, cancelled and vacated; and

3. That defendant be enjoined perpetually and during the pendency of this action, from enforcing said demands or any of them; and

4. For such other and further relief as to this court may be proper.

Thereafter on or about the 4th day of October, 1939 defendant filed and served herein its answer to the said supplemental complaint.

This case came on for pretrial hearing before Mr. Justice Laws on the 13th day of May, 1940 and said pretrial hearing was then held.

PLEADINGS

The material allegations of plaintiff's said original complaint are succinctly set forth in the following:

1. On the 6th day of October, 1938, the plaintiff first published copies of volumes I, II, III, IV and V of the composite work entitled "King Features Illustrated Weekly" by the offering for sale and the sale thereof in the United States;

2. That each of the said copies had affixed thereto, upon the title page thereof, notice of copyright in the name of the plaintiff;

3. On the 6th day of October 1938 plaintiff also first published copies of the composite work entitled "King Features Weekly" by the offering for sale and the sale thereof in the United States;

4. That each of the copies last mentioned had affixed thereto, upon the title page thereof, notice

of copyright in the name of plaintiff;

5. On the 7th day of October, 1938 said copies of the said works were, at the request of the plaintiff, further publicly exhibited and exposed and offered to the public for resale by the purchasers thereof;

6. That all said copies of said works were produced in compliance with the pertinent manufacturing requirements of the copyright statutes;

7. On the 8th day of October, 1938, pursuant to Section 12 of the copyright statutes, plaintiff deposited in the mails addressed to the Register of Copyrights, the defendant herein, two complete copies of the best edition then published of each of the aforesaid works, said deposited copies being accompanied in each case by claim of copyright thereto on behalf of plaintiff (which claims of copyright were enclosed in a letter dated October 8th, 1938, a copy of which is annexed to the complaint as Exhibit C);

8. On the last mentioned date plaintiff duly applied for registration of its said claims to copyright in and to each of said volumes of said works by filing with defendant duly completed application forms therefor (form being denominated Al of Copyright Office forms); and each said application was accompanied by the due tender to defendant of the sum of \$2.00 to effect each said registration and to secure certificates of registration;

9. On the 13th day of October, 1938 defendant acknowledged receipt of said applications and said deposited copies but defendant refused and continues to refuse (a) to effect said registrations and (b) to accept, as copyright deposits, copies of the said works deposited as aforesaid;

10. That plaintiff has duly complied with all the provisions of the copyright laws and the rules of the Copyright Office applicable to the securing of statutory copyright and the deposit and registration of claims thereto;

11. That defendant's action, in rejecting said applications and said deposits and in refusing to issue certificates of registration herein applied for, is arbitrary, unwarranted and contrary to the provisions

of the copyright laws.

12. That there is an actual controversy herein, that plaintiff has a substantial interest in the judicial determination thereof; and plaintiff asks for a declaration of its rights and of the correlative duty of the defendant, in the premises, pursuant to Federal Declaratory Judgment Act.

The answer interposed by the defendant to the said complaint contains certain significant admissions in addition to specific denials, denials of any knowledge and certain affirmative allegations. The admissions are as follows: the corporate status of plaintiff; the official status of defendant; that this action arises under the copyright laws; that the copies of plaintiff's said works, hereinlast referred to in subdivisions 2 and 4, had affixed thereto the copyright notice (copyright 1938 in the United States of America by King Features Syndicate, Inc.), as stated in the complaint; that on the 8th day of October, 1938 plaintiff deposited in the mails, addressed to defendant as Register of Copyrights, two copies (1) of each of the said volumes comprising the work entitled "King Features Illustrated Weekly" and (2) of said work entitled "King Features Weekly"; that said deposits were accompanied in each instance with claim of copyright on behalf of plaintiff; that the copy of letter of October 8th, 1938, identified as Exhibit C and annexed to the complaint, is a correct copy; that application forms A1, wherein plaintiff applied for registration of its said claims to copyright in and to said

works, were received; that with each said application, sent to defendant on October 8th, 1938, plaintiff tendered to defendant the fee of \$2.00; that on October 13th, 1938, defendant rejected said applications and deposits and refused and continues to refuse the registrations applied for.

The material allegations of plaintiff's supplemental complaint are succinctly set forth in the following:

1. On or about April 12th, 1939, April 17th, 1939, May 1st, 1939 and June 13th, 1939 (times subsequent to the filing of the original complaint), the defendant sent to plaintiff certain demands and notices, under section 13 of the statute, copies of said demands are annexed to the supplemental complaint and identified as Exhibits A, B, C and D respectively;

2. That prior to the making of said demands, particularly demands identified as B and C, the plaintiff secured copyright and duly applied for registration of its claims to copyright in and to all of the subject matter set forth in demands B and C; that such copyright was secured by the plaintiff by first publishing in the United States all the subject matter of demands B and C in and as component parts of composite volumes of works entitled King Features Illustrated Weekly and King Features Weekly;

3. That promptly after said initial publication and prior to the making of said demands B and C, plaintiff duly deposited in the Copyright Office two complete copies of the best edition of each of said composite volumes, and thereafter plaintiff duly applied for registration of claims to copyright therein, and paid or duly tendered to defendant the fees therefor at the rate of \$2.00 for each said composite volume;

4. Notwithstanding the foregoing, defendant refused to grant to plaintiff the certificates of registration covering said volumes and defendant has wrongfully refused to accept deposit of the said copies of said volumes;

5. With respect to all of the subject matter of demands identified as Exhibits A and D, plaintiff

first published, in the United States, said subject matter in and as component parts of composite volumes of works entitled King Features Illustrated Weekly and King Features Weekly, such initial publication having antedated the making of said demands A and D, and plaintiff thereby secured copyrights in and to the said subject matter of said demands; that plaintiff duly deposited in the mails, addressed to the Copyright Office, two complete copies of the best edition of each of the volumes last mentioned, (the same constituting the best edition of the work then first published and same consisting of said subject matter of demands A and D); that plaintiff duly applied for registration of its claims to copyright in and to said volumes and duly tendered fees therefor; that defendant wrongfully refused and continues to refuse (a) to accept said volumes as copyright deposits, (b) to accept said applications and (c) to issue certificates of registration for copyrights covering said volumes;

6. That plaintiff is and has been the sole and exclusive proprietor and owner of the copyrights in and to the aforesaid composite works;

7. That the said composite works have been made and bound in accordance with the statutory requirements pertaining thereto;

8. That plaintiff is entitled under the copyright law to obtain (a) registration of its claims to copyright on said composite works and each of them and for the subject matter of said demands pursuant to Section 10 of the statute and (b) certificates of copyright registration for said composite works and for the subject matter of said demands pursuant to Section 55 of the statute.

Defendant's answer interposed to said supplemental complaint contains certain admissions in addition to specific denials, denials of any knowledge and certain affirmative allegations. The significant admissions therein contained are as follows: That plaintiff deposited in the mails, addressed to the Register of Copyrights, the copies of the

volumes containing the subject matter enumerated in said demands, A, B, C and D; and that such deposit was accompanied in each case with plaintiff's claim of copyright; that with said deposits plaintiff filed its applications for registration thereto and plaintiff accompanied said applications with the tender to defendant of the fee of \$2.00 for each such application; that defendant refused (a) to grant the certificates of registration applied for by plaintiff in respect of said volumes and (b) to accept the deposit of copies thereof and (c) to accept payment of fees for said registrations tendered by plaintiff.

PRETRIAL PROCEEDINGS

At the pretrial hearing heretofore had herein it was stipulated by and between the attorneys for the respective parties hereto that "the findings of fact and conclusions of law which shall be made by the court in respect of the original complaint herein shall apply with like force to the supplemental complaint filed herein, and without necessity of formal proof with respect to such supplemental complaint".

By reason of the foregoing stipulation, we submit, if it should be found by this court that plaintiff is entitled to the relief prayed for in the original complaint on the grounds (a) that the works therein referred to (including each and every copy rightable component part thereof) were first published in the United States in volume or book form with

due notice of copyright, in the name of plaintiff, affixed thereto upon the title pages thereof and (b) that the two copies of each of said volumes which were deposited in the mails duly addressed to the Copyright Office constitute complete copies of the best edition thereof then published and (c) that the applications for copyright registration of plaintiff's claims to copyright (which accompanied the deposit of the copies) in and to said works should have been granted by the defendant so that certificates of said registrations, upon the admitted tender of \$2.00 for each application, should have been issued to the plaintiff, then the relief prayed for in the supplemental complaint should be granted because the same findings and ground for relief in respect of the volumes referred to in the original complaint are to, and would necessarily, apply with equal force to the volumes referred to in the supplemental complaint (all volumes being of substantially the same type and form) with appropriate corrections only as to dates of first publication, dates when deposits of copies in the Copyright Office (through the mails) were actually made and dates when applications for registration of plaintiff's claims to copyright were actually filed, accompanied by the tender of the \$2.00 fee for each said application.

At the pretrial hearing there was presented to the court one copy of each of the volumes referred to in the original complaint and which had been deposited by plaintiff on October 8th, 1938 and received by defendant

October 10th, 1938. In respect of each such copy it was stipulated that the same might be received in evidence without formal proof.

ADDITIONAL STIPULATIONS

The following otherwise litigable matters have been stipulated to by the attorneys for the respective parties:

1. That plaintiff has complied with all the requirements of sections 15 and 16 of the Copyright Statute;

2. That plaintiff is and has been the copyright proprietor of all the material contained within the works referred to in the original complaint;

3. That plaintiff was such copyright proprietor at the time it filed its applications for copyright registration, as referred to in the original complaint.

THE FACTS

By virtue of the said pretrial stipulation we shall, hereafter in this memorandum, limit our attention to matters of fact and law pertinent to the issues raised by plaintiff's original complaint herein and defendant's answer thereto.

The facts to be adduced by the plaintiff upon the trial hereof will show:

1. That six complete copies of each of the composite volumes comprising the works referred to in the original complaint were first sold by the plaintiff on the sixth day of October, 1938. (A duplicate copy of each of said volumes has heretofore been identified on the pretrial hereof

and has been marked in evidence in connection with the taking of certain depositions herein by the plaintiff; duplicate copies of King Features Illustrated Weekly volumes I, II, III, IV and V thereof have been so marked in evidence as plaintiff's Exhibits A, B, C, D and E respectively and the duplicate copy of the one volume of King Features Weekly has been so marked in evidence as Plaintiff's Exhibit F; copies of said volumes may hereinafter be referred to for identification by use of the said exhibit letters);

2. That, in particular, of the six said copies so first sold by plaintiff, two copies thereof were sold to independent, retail newsdealer, John J. Burns, two copies thereof were sold to independent, wholesale newsdealer, Dennis J. Durney, and two copies thereof were sold to independent, wholesale-retail newsdealer and book-seller, Henry Davidow;

3. That said sales were under and pursuant to written contracts between the plaintiff and the said newsdealers;

4. That the two copies of Exhibits A, B, C, D, E and F so sold were delivered by plaintiff to the purchasers thereof by deposit of the same in the mails on October 6th, 1938;

5. That the said sales of the said copies were outright and imposed no restriction, qualification or limitation whatsoever upon the purchaser's title to the copies;

6. That on October 7th, 1938, that is upon receipt of the copies, as delivered by plaintiff to the said purchasers under said contracts of sale, the copies were, at the request of the plaintiff, exhibited, exposed and offered to the general public for sale by the said purchasers;

7. That beginning with October 7th, 1938, any member of the public could, for so long as the supply lasted, have purchased one or more of said copies from any one of the said newsdealers upon payment of the retail price therefor, such retail price, as fixed by each newsdealer (in the exercise of independent judgment and without control by plaintiff) for his particular copies, ranged from 25¢ per copy to 50¢ per copy;

8. That each copy of the volumes so sold contained, upon the title page thereof, notice of copyright in the form of "Copyright 1938 in the United States of America by King Features Syndicate, Inc.";

9. That all the copyrightable material contained within copies of Exhibits A, B, C, D, E and F was first published, in the United States, by authority of plaintiff, exclusively by means of the said first sale of said copies of the works on October 6th, 1938, excepting only that for an extremely unsubstantial number of copyrightable items which were included in copies of Exhibit F, which items had previously been published; that the inclusion of those few previously published items was due to mistake; that of the 119 separate literary items included within Exhibit F only 19 thereof were so previously published.

10. That the copies of Exhibits A, B, C, D and E contain the printed literary and artistic material of different authors and artists acting independently of one another (this fact is admitted, inferentially at least, in paragraph 23 of defendant's answer);

11. That the copies of Exhibit F contain mimeographed literary material of different authors acting independently of one another;

12. That plaintiff was at all times mentioned herein, and presently is, the copyright owner and proprietor of said works and of all the material contained within said works (see concession to that effect made by the attorney for defendant on letter from attorney for plaintiff to attorney for defendant dated June 5th, 1940);

13. That the copies of the said works as copyrightable composite entities or units in the form of bound volumes or books were first published with notice of copyright by the said sale of copies thereof on October 6th, 1938 in conjunction with the general offering for sale of copies to the public on October 7th, 1938;

14. That, as and for copyright deposits, the plaintiff deposited in the mails, properly addressed to the Copyright Office, two complete copies of each

of the volumes identified as Exhibits A, B, C, D, E and F; that, that deposit was made on October 8th, 1938 and copies so deposited were received by the Copyright Office on October 10th, 1938; that each such deposit was accompanied by plaintiff's claim of copyright thereto; that with each such deposit plaintiff filed its duly completed and executed application for copyright registration of its said claim, same being on form Al as prescribed by Copyright Office rules and regulations; that plaintiff thereupon tendered the fee of \$2.00 for each registration in and to each volume of said works (that there was submitted with each completed Al application form the sum of \$2.00 has been conceded by attorney for defendant and the same is admitted by pleadings);

15. That the copies deposited, as aforesaid, constituted exact and complete copies of the said works as first sold to said newsdealers; that the copies deposited, as aforesaid, constituted exact and complete copies of the said works as first published in the United States by authority of the plaintiff; that the deposited copies constituted complete copies of the only edition of plaintiff's said material ever published by plaintiff in that form;

16. That the copies deposited, as aforesaid, constituted complete copies of the only and best edition of the said works then published;

17. That none of the material contained within plaintiff's exhibits A, B, C, D and E had appeared (been republished) in newspapers prior to October 8th, 1938, that is the date when copies of the said works were deposited in the mails addressed to the Copyright Office;

18. That the plaintiff prepared and produced copies of Exhibits A, B, C, D, E and F with special care and for the purpose and with the intention of making sales thereof; that said copies constitute, therefore, final products;

19. That the printing matter contained within the copies of Exhibits A to E inclusive is superior to newspaper printing of the same subject matter;

20. That the quality and grade of paper contained within the copies of Exhibits A to E inclusive, consisting in certain instances of "coated paper" and in other instances of "English finish", are superior to

newsprint paper;

21. That the plaintiff is, and has been for many years past, engaged in the business of creating literary and artistic material, in the form of cartoon or comic strip features and special articles, and thereafter licensing newspapers to publish such material; such licensing is governed in most instances, by written contracts between the plaintiff and its newspaper licensees (clients); the permission granted to licensee-newspapers to publish the material is conditioned upon (a) that publication in the newspaper may obtain only upon or after (never before) the date fixed therefor by plaintiff and (b) affixing proper notice of copyright in plaintiff's name to the material; the dates of such permitted publication, that is, publication under authority from the plaintiff, are known in the trade as "release dates"; each feature or special article has its own "release date"; the "release date" in connection with newspaper publication has been defined as "the date on which the newspaper was authorized to publish the material" or the date "on which the newspaper is authorized to publish the feature"; that newspaper-licensees of plaintiff are not obligated to publish plaintiff's material, the said licensees merely acquire the right to publish;

22. Since on or about June of 1933 the plaintiff has prepared and produced bound volumes or books of its literary and artistic material, books which contain upon their respective title pages due notice of copyright in plaintiff's name; that plaintiff has secured copyright in and to the contents of the said books by having effected initial publication of the books; that such copyright-initiating publication of the said books consistently antedated the permitted republication of the contents thereof in newspapers; that such books were of the same general nature (but of inferior appearance in respect of printing and quality of paper) as copies of Exhibits A to F inclusive; that from on or about June 1933 continuously to on or about October 1936 the defendant and his predecessors in office have accepted deposit of copies of those books and granted plaintiff's applications for registration of claims to copyright thereon and duly issued to plaintiff certificates of such registrations upon the payment by plaintiff of the statutory fee therefor in the sum of \$2.00 for each application for each book;

23. That it has been the settled practice of

the Copyright Office for more than three years, especially during the years from about July of 1933 to October of 1936, to accept deposits of copies of books similar to plaintiff's Exhibits A to F inclusive and to accept applications for, and to grant certificates of, registration of claims to copyright in and to such books;

24. That defendant, upon receipt of the 12 deposited copies, the six separate applications for registration and the tender of \$12.00 (at the rate of \$2.00 for each registration for each separate volume), rejected plaintiff's deposits and said applications and refused to accept the same or the fees tendered therefor; defendant's said rejection was embodied in his letter to plaintiff, dated October 13th, 1938;

25. That defendant predicated his said rejection and refusal upon the following alleged grounds:

a) That the copies of Exhibits A to E inclusive consist of page proofs of the material therein contained and do not, therefore, constitute the best edition thereof (see defendant's letter, dated May 27th, 1938, addressed to the attorney for plaintiff - which letter is incorporated by reference into defendant's rejection of October 13th, 1938);

b) The material contained within copies of Exhibits A to F inclusive, is, in whole or in part, subsequently published in newspapers under authority of plaintiff (see defendant's letters dated May 27th, 1938 and May 12th, 1938 - both of which are incorporated in defendant's rejection of October 13th, 1938);

c) That the material contained within said Exhibits A to F inclusive was "created for one purpose only ***, to wit, sale and distribution to the public in the form of contributions to newspapers" (see defendant's letter dated February 26th, 1938);

d) That defendant has no authority to grant the registrations herein applied for, that is, registrations of plaintiff's claims to copyright in and to the books comprising plaintiff's said works (see defendant's said letter of May 27th, 1938);

e) That the only registrations which defendant allegedly can and will grant in respect of the material contained within plaintiff's said Exhibits are for contributions to a newspaper when applications for such registrations are accompanied by (1) the deposit of at

least one copy of the newspaper in which the contribution appeared for each contribution and (2) the fee of \$2.00 for each contribution.

APPLICABLE LAW.

POINT I

THE PLAINTIFF DULY SECURED STATUTORY COPYRIGHT IN AND TO EACH OF THE VOLUMES COMPRISING THE WORKS HEREIN ENTITLED "KING FEATURES ILLUSTRATED WEEKLY" AND "KING FEATURES WEEKLY".

The pertinent provision of the copyright statute in respect of the securing of copyright thereunder is section 9 thereof. That section provides:-

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the Copyright proprietor *****". (17 U. S. C. A. 9)

It is settled law that the essence of statutory copyright is the publication of the copyrightable work with notice of copyright duly affixed thereto.

The Washingtonian Pub. Co. Inc. v. Pearson et al.,
306 U. S. 30;

Fleischer Studios, Inc. v. Freundlich, Inc. et al.,
73 Fed. (2) 276;

Lumiere v. Pathe Exchange (Inc.) et al., 275 Fed. 428

Universal Film Mfg. Co. v. Cooperman, et al., 212
Fed. 301, aff'd. 218 Fed. 577

In the Washingtonian case, supra, the court said on page 37:-

"The present statute (Sec. 9) declares - 'Any

person entitled thereto by this Act may secure copyright by publication thereof with the notice of copyright required by this Act (Sec. 18) *** and respondents rightly say 'It is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the notice of copyright.'

Again in the last mentioned case, the court said on page 39:

"Petitioner's claim of copyright came to fruition immediately upon publication. Without further notice it was good against all the world. Its value depended upon the possibility of enforcement."

The publication which initiates statutory copyright in and to a work is the first or initial authorized publication of the work with the prescribed notice affixed. Section 62 of the statute defines "the date of publication", for works of which copies are reproduced for sale or distribution, as "the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright or under his authority." (17 U. S. C. A. 62) Moreover, section 23 of the statute prescribes the termini of the copyright term; the initial term during which copyright "shall endure" is "for twenty-eight years from the date of first publication." (17 U. S. C. A. 23)

In the case at bar, plaintiff effected outright and unrestricted sales of six copies of its said works (notice of copyright having been duly affixed to each) on October 6th, 1938. Immediately thereafter, on October 7th, 1938, the said copies were displayed, exhibited and offered

to the general public for purchase at retail at a non-prohibitive price per copy; in certain instances copies were so purchased at retail. We submit, plaintiff's said sales, especially in conjunction with subsequent authorized offering to the general public, constituted publication of the said works sufficient to initiate or secure statutory copyright therein and thereto.

Stern v. Remick & Co., 175 Fed. 282

Mittenthal Inc. v. Irving Berlin Inc. et al, 291 Fed. 714

Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. (2) 556

Patterson v. Century Productions Inc. et als., 93 Fed. (2) 489

Weil on Copyright, Sections 306 et seq. 317 pp. 124 and 127 respectively

DeWolf on "An Outline of Copyright Law" p. 29

In Weil, supra, sections 306 et seq. the learned author thereof states:

"The 'public' may consist of one person. An unrestricted sale of a single copy has been held a publication sufficient to divest common law copyright and to initiate statutory copyright, even though made for copyright purposes only. Hence a publication is not measured by the size of the public to whom it is made."

In the case of Stern v. Remick, supra, at page 283, the court said:-

"***publication occurs as soon as the work is unrestrictedly made public in any way."

In that case there was but one sale of the copy of the work, which sale was consummated solely for a

copyright purpose; nonetheless, the court held that publication had taken place. Although the Stern case was decided under the statute immediately prior to the present statute, the court, in a later case, namely, Mittenthal v. Berlin, supra, stated:

"***Stern v. Remick *** was rightly decided because there had been a sale." (underscoring mine) p. 715

In the Atlantic Monthly case, supra, the court held that there is no place in the law of copyright for the question of "colorable" sales as distinguished from bona fide sales.

In DeWolf, supra, at page 29 the learned author states the rule to be:

"It may be said in general that publication of a work which is of a character to be distributed in copies means simply the placing of copies at the disposal of the public, whether by sale or gift. The number of copies so disposed of is immaterial. Publication may take place by the sale of a single copy, or even by the exhibition of copies meant for sale, or distribution, though none of them leaves the hands of the dealer." (underscoring mine)

We adverted above to section 62 of the Copyright Act. The definition therein contained, however, was not designed to exhaust the means by which "publication", in the copyright acceptation of the term, may be effectuated; that statutory definition is not a general one of what constitutes "publication". (Cardinal Film Corp. v. Beck, 248 Fed. 368; Patterson v. Century Productions, Inc., supra).

Theoretically, there can be no publication sufficient to initiate statutory copyright under said section 9 unless and until there has been a divestment of the common law right of authorized first publication (Photo-Drama Motion Picture Co. v. Social Uplift Film Corp., 220 Fed. 448, 450). Upon authorized first publication the work will be dedicated to the public, will fall into the public domain, unless the copyright notice, as prescribed by the statute, is duly affixed or applied to the work; in other words, but for the copyright notice, acts which would "dedicate" the work, will clearly spell out a general publication of the work (Patterson v. Century Productions, Inc., supra) Notwithstanding the consequent loss of common law rights, it has been held that "the unrestricted offer of even a single copy to the public implies the surrender of the common law right" (Werckmeister v. Am. Lithographic Co., 134 Fed. 321). If such unrestricted offer will be sufficient for a divestitive publication, a fortiori, it should be sufficient to spell out an investitive publication.

It is submitted, by reason of the foregoing authorities, that the plaintiff herein duly secured statutory copyright in and to books or volumes comprising its said works. There has never been any issue between the plaintiff and the defendant herein in respect of the propriety of the notices of copyright appearing upon the title pages of the said books. In any event, the said notices in the volumes are in the form prescribed by section 18 of the statute and

they have been applied to all authorizedly published copies thereof, as prescribed by section 19 of the statute. Moreover, the defendant has conceded, inferentially, "the validity of the" plaintiff's "claim of copyright to the material submitted for registration" (see defendant's said letter to plaintiff's attorney, dated February 26th, 1938 - underscoring ours); and defendant has said, "Let me emphasize that my action in this case is taken without reference whatsoever to the question as to whether the material which you submit for registration has been published or whether you have secured a copyright therein." (see defendant's said letter to plaintiff's attorney, dated May 12th, 1938, underscoring ours).

It is submitted that the plaintiff's bound volumes herein constitute composite works in the form of books. The pertinent provision of the statute is section 3 thereof, which is as follows:

"That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act."

It will be noted from a reading of said section 3 that the disjunctive is used insofar as reference is made to "composite works or periodicals". Manifestly, a work

may be a composite without being a periodical; conversely, a periodical, conceivably, may not be a composite work. The element of periodicity inherent in a periodical would appear to be entirely neutral on the question of whether the work is a composite. However, it is clear from section 3 that both a composite work and a periodical may each be copyrighted as a entity and the copyright secured thereon will protect and extend to "all copyrightable component parts" thereof. In the instant case, each of plaintiff's volumes consists of the independent contributions of numerous authors and artists brought and bound together and published as a unit or single work; each, therefore, constitutes a composite work. Plaintiff's volumes are no different, in content, from a book of short stories or a book or compilation of articles or pictures by various and sundry authors and artists.

That a copyright (evidenced by a single, blanket notice of copyright) may be secured upon a composite work and that such copyright will embrace all the copyrightable component parts thereof (the plurality of separate contributions therein contained) finds support not only in the provisions of sections 3 and 19 of the statute but also in the decisional law by which those sections have been construed. As a corollary, where such copyright has been so secured, the work is to be treated as an entity or integrated whole for registration purposes; the copyright being unitary,

only the registration of the claim thereto need be made.

Kaplan v. Fox Film Corporation, 19 Fed. Supp. 780
(33 U. S. P. Q. 469)

Whitmark & Sons v. Standard Music Rolls Co., 213
Fed. 532

Harris v. Coca Cola Co., 1 Fed. Supp. 713, aff'd.
73 Fed. (2) 370, cert. den. 294 U. S. 709

Basevi v. O'Toole Co. Inc., 26 Fed. Supp. 41

Drone on Copyright, p. 144

Weil on Copyright, supra, sect. 811 p. 319

In the Kaplan case, supra, the court held that an assignment of copyright in and to the cover design of a magazine could validly be made by the proprietor of the copyright covering the entire magazine. The court therein, on page 781, said:

"The usual method of acquiring statutory copyright on a contribution of a periodical is by the publisher taking copyright on the entire periodical. The copyright act in section 3 provides for this: (then follows the wording of section 3).

"The provision that the copyright on the periodical shall give to the proprietor 'all the rights in respect thereto which he would have if each part were individually copyrighted under this title' makes the publisher's position the same as if he had taken out separate copyright on each picture and article contained in the periodical. It follows that the publisher may make valid transfer of copyright on one picture in the periodical, keeping for himself the copyright on all other contents of the periodical."

In Harris v. Coca Cola Co., supra, the lower court, in construing the term "composite work" as used in

the statute, said at page 717:

"'A book includes the entire volume, and every part or division of a volume published separately, including the illustrations in it.'

"Congress intended by the use of the term 'composite work' to include such works as compilations, directories, encyclopaedias, and other collections of this nature, which are independent and distinct works by various authors brought together and published as one work." (underscoring ours)

In the Harris case, supra, the Appellate court by way of construing the term "composite work" in connection with renewals of copyright said, on page 37:

"Composite works, that is, those composed of the copyrightable work of several persons, are provided for in these sections and are put on a special basis, ****." (underscoring ours)

In Drone, supra, it is said:

"The copyright protects the whole and all the parts and contents of a book. When the book comprises a number of independent compositions, each of the latter is as fully protected as the whole."

A judicial interpretation of the term "component part" as it appears in said section 3 of the Act, is found in New Fiction Pub. Co. v. Star Co., 220 Fed. 994, 997, where the court said:

"Without intending to construe this section further than necessary for the purposes of this case, it is clear that 'component parts' does not mean subdivision of rights, licenses, or privileges, but refers to the separate chapters, subdivisions, acts and the like of which most works are composed." (underscoring ours)

That the plaintiff's said volumes are comprised

within the category of books, in the copyright acceptance of the term "books", is supported, we submit, not only by the inclusive definition of that term found in section 5 of the Act and by Rule 4 of the Rules and Regulations of the Copyright Office, but also by the following authorities:

Fleischer Studios v. Freundlich, Inc. supra; Weil, supra, 73 276
secs. 532 et seq., 543 at pp. 201 et seq., 207; DeWolf, supra, p. 86.

Section 5 of the Act, which pertains to classification of works for registration, sets forth a very broad definition of the term "books". That term is therein defined as "including composite and cyclopedic works, directories, gazetteers and other compilations."

In the Fleischer case, supra, the Circuit Court of Appeals for the Second Circuit, held that the mere assembling, in bound leaf form, of a series of unconnected poses of a cartoon character (without story or continuity) constituted a book within the classification of copyrightable works under the Act.

It is submitted, a work may be properly characterized as a "book" irrespective of its size, form, purpose or subject matter (Weil, supra, p. 207; DeWolf, supra, p. 86) and even though its contents be (a) devoid of verbiage or (b) thematically unrelated (Fleischer Studios, Inc. v. Freundlich, Inc., supra).

In the case at bar, plaintiff duly secured its copyrights in and to its said bound volumes. It is entirely immaterial to the issues herein, we submit, that plaintiff thereafter authorized the republication in newspapers of certain or all of the copyrighted component parts of the said volumes. As we have said, the crucial initial publication of the volumes (and of all the copyrightable parts thereof) was effected by the sales of copies; upon making such initial publication, plaintiff's copyrights came into being. "In form, statutory copyright is effected by the act of the person claiming the privilege" (Eggers v. Sun Sales, 263 Fed. 373, 374). The subsequent appearance in newspapers of the already copyrighted material contained within the volumes would, inescapably, constitute a mere republication - an act of no moment, we submit, from a copyright/^{registration} standpoint.

Manifestly, the plaintiff, as the proprietor of the copyrights secured upon its said volumes could thereafter license others merely to republish (in two or three dimensional form) all or any part of the copyrighted components of the volumes - and this could be done without impairing its said copyrights (assuming due notice appeared on the republished components) and without the necessity or right of re-copyrighting or re-registration (Basevi v. O'Toole, supra; Fleischer Studios, Inc. v. Freundlich Inc., supra; Advertisers Exchange, Inc. v. Lafe, 38 U. S. P. Q. 93).

Concededly, the plaintiff's said volumes present

a superfluity of copyright notices inasmuch as each separate item therein contained has affixed thereto a notice in the name of the plaintiff. All the plaintiff has done, we submit, is to make express that which would obtain by the operation of section 3 of the Act (Kaplan v. Fox Film Corp., supra); or to put it another way, by reason of section 3 of the Act, the effect of a single, blanket notice is to give to the proprietor of a composite work or book "all the rights *** which he would have if each part were individually copyrighted under this title", the plaintiff in this instance specifically and expressly indicated that statutory status by a plurality of notices. The specific notices could have been omitted. We submit, their presence is of no especial significance.

POINT II.

PLAINTIFF DULY COMPLIED WITH THE
PROVISIONS OF THE STATUTE IN RESPECT
OF THE DEPOSIT OF COPIES AND REGIS-
TRATION OF ITS CLAIMS TO COPYRIGHT
IN AND TO ITS SAID WORKS.

After securing its copyrights in and to the said volumes, plaintiff deposited two complete copies thereof in the mails addressed to the defendant and applied for registration of its claims to copyright. That procedure, we submit, was in accordance with the modus operandi contemplated by the statute. The pertinent provision of the statute is section 12. That section provides:

"That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this Act; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section eleven of this Act, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

(underscoring ours)

A close analysis of the language of said section 12 leads irresistibly, we submit, to this: that once copyright has been secured by publication of a particular work (as was done herein by publication of the said volumes), there is to be promptly deposited two complete copies of the particular work and the deposited copies are to be of the best edition of the particular work as published at the time of the making of the deposit; each such deposit is to be accompanied by "a claim of copyright" i. e. by application

for registration. ("Claim of copyright" has been interpreted by Rule 24 of the Copyright Office Rules as "application for registration".) In the case at bar, plaintiff scrupulously and literally complied with the statute in respect of deposit and claim of copyright; on October 8th, 1938 (promptly after its copyright in and to the volumes had come into being by publication) plaintiff deposited in the mails two exact copies or duplicates of each of the volumes; plaintiff's then published works consisted entirely of the said volumes; the volumes so deposited were exact copies of the only edition of plaintiff's then published works; by virtue of being exact copies of the only then published works, the deposited copies, perforce, constituted complete copies of the best edition of the then published works.

Moreover, at no time after said deposit of the said copies in the mails has the plaintiff published any other edition of its said works.

The plaintiff's applications for registration, as we have said and as is admitted, were embodied in duly completed copyright office forms A1 for "Books Now First Published in the United States". The plaintiff classified its deposits as books. By necessary implication of the wording of Section 5 of the Act, the classification of the work is to be made by the applicant. Said Section 5 provides, in part, "the application for registration shall specify to which of the following classes the work in which copyright claimed belongs:" (17 U. S. C. A. 5) Plaintiff claimed copy-

right in and to the bound volumes by virtue of publication precedent to deposit; therefore, the work in which copyright was claimed belonged to Class (a) of Section 5 of the Act, that is, the class covering "Books". Any error in classification, however, would not "invalidate or impair the copyright." (17 U. S. C. A. 5)

The plaintiff tendered to the defendant simultaneously with the filing of its said applications, the fees provided in Section 61 of the Act, that is, fees at the rate of \$2.00 for each volume. Parenthetically, plaintiff could, we submit, have stood upon the last proviso clause of Section 61 of the Act and tendered only the sum of \$2.00 for the five volumes of King Features Illustrated Weekly and \$2.00 for the volume of King Features Weekly; that said proviso clause reads "that only one registration at one fee shall be required in the case of several volumes of the same book deposited at the same time" (17 U. S. C. A. 61). Plaintiff did not take advantage of that clause because of the request of defendant's predecessor; and plaintiff filed separate applications for each of the volumes and tendered the \$2.00 fee for the registration of each, \$12.00 in all.

The plaintiff became entitled, we submit, (a) to have its claims of copyright in and to the volumes of its said works registered, as herein duly applied for, by the entry thereof in the record books of the Copyright Office as provided in Section 54 of the Act and (b) to the certificates

of registration thereof as provided in Section 55 of the Act. That the plaintiff was so entitled is shown by the Section 10 of the Act. Section 10 provides:

"Such person" (that is, the person entitled to secure copyright by publication, as provided in section 9) "may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the register shall issue to him a certificate provided for in section 55 of this Title."

The permissive language of said section 10 pertains to the copyright owner; the mandatory language of that Section pertains to the duties of the defendant, as Register. The term "shall" is a term of mandatory import (Douglas v. Cunningham, 294 U. S. 207; Jewell-LaSalle Realty Co. v. Buck, 283 U. S. 202; Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 Fed. (2) 282, 283 et seq.)

Once the plaintiff secured its copyrights in and to its said works, the plaintiff had a clear right, and was under a so-called quasi-duty, to make the deposit of copies thereof as it did herein. Although the apparently mandatory language of said Section 12 of the Act would seem to require that deposit be made "promptly", a copyright will not be invalidated nor its enforceability impaired by reason of tardy deposit (Washingtonian Pub. Co. Inc. v. Pearson et als, supra); nonetheless, deposit should be made. Plaintiff made such deposit with due diligence. That the plaintiff did herein precisely what it should and could have done under Section 12 of the Act, is fortified, we submit, by

considering what might otherwise have happened had no deposit of copies of the said works and applications for registration been made: Firstly, the plaintiff, having secured copyrights on the works herein, would become subject to a demand by the Register, under Section 13 of the Act, make deposit of copies of the said works (to preclude such demand as might be made at some far distant future date, plaintiff was under a so-called quasi-duty to make deposit as it did); secondly, inasmuch as deposit and registration, as stated in Section 12 of the Act, are the conditions precedent upon which the jurisdiction of the court is bottomed for the maintenance of an action or suit for infringement (New York Times v. Star Co., 195 Fed. 110; New York Times Co. v. Sun Printing and Publishing Association, 204 Fed. 586), plaintiff would be unable to vindicate its said copyrights. To assure its capacity to sue immediately in case of infringement and to enjoin the wrong, plaintiff made the deposit and filed its applications herein; the value of plaintiff's said copyrights "depended upon the possibility of enforcement" (Washingtonian Pub. Co. v. Pearson et als, supra, p. 39).

Two cases which are cogently in point and fully sustain plaintiff's contentions herein (those cases we submit, on their facts go so far as to make plaintiff's case an a fortiori one) are Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. (2) 556, and U. S. ex rel. Twentieth Century-Fox Film Corp. v. Bouve, as Register of Copyrights,

33 Fed. Supp. 462 (the latter having been decided by Mr. Justice Bailey in the District Court for the District of Columbia on April 29th, 1940).

In the Atlantic Monthly case, supra, the court had before it the challenged validity of the Atlantic Monthly's alleged copyright in and to a timely special article written by one, Alfred E. Smith, then a candidate for the presidency of these United States; the Smith article was first to be published in the Atlantic Monthly Magazine, the magazine having acquired the right to copyright the same and first to publish the article; after the article had been written, three galley proofs thereof were run off incident and preliminary to the printing of the article in the said magazine; one such galley proof of the article, containing copyright notice in the name of the Atlantic Monthly, was thereupon unconditionally sold to one of the officers of the Atlantic Monthly; immediately thereafter the other two galley proof copies were filed with, and accepted by, the Register of Copyrights, as the deposits required by section 12 of the Act, and registry of the Atlantic Monthly's claim to copyright thereon was made by the Register. The court therein held that (1) the Atlantic Monthly, by reason of the unconditional sale of a galley proof copy had secured a valid copyright on the Smith article as embodied in the galley proofs thereof and (2) inferentially, that the deposit of the two galley proof copies, they being the only then published

copies, of the article constituted effectual and valid deposit under Section 12 of the Act and that the claim thereto was validly registered in the Copyright Office.

In the above referred to Twentieth Century-Fox Film Case, supra, the court had before it a story written for the plaintiff therein; that story was designed for serial publication in newspapers by the publishing of twenty separate chapters or installments; each chapter carried, at the end thereof, a separate notice of copyright; the twenty chapters were bound together in a few single volumes and a few of the volumes placed on sale; each bound volume carried a plurality of specific notices of copyright together with a blanket notice of copyright to cover the whole; each bound volume consisted of pages printed on one side only and those pages were unnumbered; after a few of the volumes had been placed on sale, Twentieth Century forwarded two complete copies of the volumes to the Register of Copyrights with its claim of copyright therein and thereto; the defendant herein refused to accept the deposit; the plaintiff therein applied for a writ of mandamus to compel the defendant herein as Register to accept its said deposit and to register its said claim of copyright. The court therein held for the plaintiff and sustained the writ. Mr. Justice Bailey, in his opinion therein, speaking to the issues of whether copyright had been secured by sale of few copies of the bound volumes and whether the copies of the bound volumes deposited by

Twentieth Century-Fox were in compliance with the statute, said at page 463:

"The plaintiff obtained a copyright on its work 'In Old Chicago' in December, 1937, by publication with notice of copyright. The work was actually offered for sale to the public and although the number of copies offered for sale was quite small, and the publication made as a requisite for bringing suit to enforce registration, it cannot be said that there was no publication, for had the work been offered for sale without the copyright notice there would have been a surrender of all right to a copyright.

"The defendant refused to register the copyright chiefly on the ground that the writing sought to be copyrighted consisted merely of 'page proof' of a contribution to a newspaper and that the newspaper containing the serialization should be deposited instead of the page proof.

"The book in question does have some of the characteristics of 'page proof'. The sheets are printed on one side only, each page has a separate copyright notice and a resume of the preceding pages, but the sheets are bound together in the form of a book. The fact that it was apparent from the face of the book that the purpose was to have it published in installments in periodicals does not in my opinion prevent the registration of the whole as a book. Nor can it be said that this was not 'the best edition thereof then published', it being the only complete edition."

POINT III.

THE ACTION OF THE DEFENDANT HEREIN, IN REFUSING TO ACCEPT PLAINTIFF'S DEPOSITS HEREIN AND TO REGISTER PLAINTIFF'S CLAIMS TO COPYRIGHT COVERING ITS SAID WORKS, IS ARBITRARY, UNAUTHORIZED AND WITHOUT WARRANT IN LAW.

As was decided in the Twentieth Century-Fox Film case, supra, the defendant herein, as Register of Copyrights, is possessed of only very limited powers. In that case,

at page 463, the court said:

"As to the discretionary power of the Register of Copyrights, I think that he has no power to refuse to register any copyright that is entitled to registration under the law; that it is a question of fact whether the applicant has complied with the law; that if he has complied with the law he is entitled to have the copyright registered; that any finding of fact or conclusion of law on the part of the Register of Copyrights are not binding upon the court."(underscoring ours)

Such powers as the Register of Copyrights possesses are derived solely from the Act. The Act, upon close scrutiny of its pertinent provisions, discloses that the ambit of these powers is singularly small; the powers are of "most meagre description" (Weil, supra, secs. 544 et seq. pp. 207 et seq.) The Register is appointed by the Librarian of Congress (17 U. S. C. A. 48); and he is empowered, subject to the approval of the Librarian "to make rules and regulations for the registration of claims to copyright ***" (17 U. S. C. A. 53); he is required to "provide and keep such record books *** as are required to carry out the provisions of this Title, and whenever deposit has been made in the Copyright Office of a copy of any work under the provisions of this title he shall make entry thereof (17 U. S. C. A. 54 underscoring ours); he is required to issue a certificate of registration "in case of each entry" to "the person recorded as the claimant of copyright" (17 U. S. C. A. 55 - underscoring ours).

As an aid to construction of the Act, resort is permissible to the report of the Congressional Committee which recommended passage of the Act (Washingtonian Pub. Co.

v. Pearson et al, supra); that report is the one of the House Committee on Patents (60th Congress, 2nd Session) Number 2222. In that report the Committee, in respect of section 53 of the Act, said at page 20:

"Section 53 provides for the making of rules and regulations and does not confer upon the Register any judicial functions." (underscoring ours)

The duties of this official (as his official name, to wit, "Register" implies) are predominantly ministerial. He is not clothed by the statute with any power, nor is machinery therefor provided, to make preliminary examinations or investigations to ascertain or determine (1) whether one claiming copyright is, or is not, prima facie entitled to it, or (2) whether "there has been substantial compliance with the formalities incident to obtaining statutory copyright" (Weil, supra, secs. 1620 et seq. p. 568), or (3) whether deposits received in the Copyright Office were received "as copyright deposits" (Davies v. Bowes, 219 Fed. 178, 180), or (4) whether that to which copyright is claimed, is legally copyrightable (Eggers v. Sun Sales, 263 Fed. 373, 374).

The defendant's authority to make rules and regulations, as granted by section 53 of the Act, does not authorize the making of "definitions explanatory of the words of the Act" (Weil, supra, sec. 551, p. 209); and such authority is to be held within the bounds of the statute (Patterson v. Century Productions, Inc. et al, supra).

We submit, the defendant is given no discretionary power to pass upon the question of whether deposits received are in compliance with the Act - whether they are in such compliance is committed exclusively to the Courts (Ex rel Twentieth Century-Fox Film v. Bouve, supra; Davies v. Bowes, supra); in any event, any finding made by the Register in that regard would be inconclusive and not binding upon this Court (Twentieth Century-Fox Film v. Bouve, supra).

We submit, further, the defendant is without any authority to go behind, or to question the correctness, of statements contained within an application for registration (Weil, supra, sec. 1622 p. 568). Yet, that is precisely what the defendant has done herein: in plaintiff's applications, the copies of its bound volumes are stated to be "complete copies of the best edition" of the books "First Published". In fact, plaintiff's deposits herein were correctly so stated.

The defendant, in refusing to accept plaintiff's said deposits and to make entry of its applied for registrations, argues that plaintiff's deposits consist of page proofs. We urge that the deposits do not consist of page proofs because they are final editions of the work. A "proof" is defined in printing as "a trial impression, as from type, taken for correction or examination" (Webster's New International Dictionary p. 1717). Plaintiff's works were complete and ultimate products designed to be published in that form; they were not made for mere correction or exam-

ination. But even if we assume, arguendo, that plaintiff's works did consist of pages having some of the aspects of so-called "page proofs", they were, nonetheless, acceptable because the plaintiff's works were published and copyrighted in that form, and they, in fact, were the best and only editions thereof published at the time of deposit (Twentieth Century-Fox Film v. Bouve; Atlantic Monthly Pub. Co. v. Post Publishing Co., supra; see also 28 Opinions of the Attorney General of U. S. pp. 265-269 where a typewritten article was stated to be an acceptable deposit).

Furthermore, as will be established by plaintiff's proof herein, neither the said bound volumes nor the pages therein contained are forwarded to newspapers by the plaintiff. Most of the material contained within the volumes A to E inclusive, is made by plaintiff directly from photo-engravings. Although all or part of the subject matter contained within the volumes may, subsequent to the publication thereof in and as components of volumes, appear in newspapers of licensees of the plaintiff, the plaintiff's practice is to forward mats of that subject matter to the newspapers. A mat (matrix) is a combination of pulp and clay material. The reproductive printing process used by the newspaper first involves the making of stereotype plates from and of the matrix; the stereotype plates are used as the base from which the newspaper then prints the material. The so-called "identifying

proof" which is also forwarded to newspapers is not exactly like the pages of the material contained within the bound volumes - but even this "identifying proof" is not an intermediate stage in the reproductive printing process pursued by the newspaper in respect of the material. The powers of the defendant herein have been analogized to those of the Register of Deeds (Twentieth Century-Fox Film v. Bouve, supra). Assuming such analogy to be persuasive, then the defendant would be under compulsion to accept the deposits and make entry of the claims to copyright of those works which "purport on their face to be of the nature of the instruments entitled to be filed and recorded" (Dancy v. Clark, 24 App. C. of Dist. of Col. 487). Measured by that test, the plaintiff's deposits, read together with its applications for the registration, were acceptable under the Act. We submit, that the defendant, by his action in refusing to accept the same and to make entry of plaintiff's claims exceeded such authority as is given him by the Act and rested his refusal upon legally impermissible grounds: the refusal, therefore, would be arbitrary with the consequence that defendant's action should be coerced. The copies of the plaintiff's works, herein deposited, "literally and specifically" meet the requirements of the statute, and it was not within the province of the defendant to superadd to those statutory prescriptions (Payne v. Railway Publishing Co., 20 App. C. of Dist. of Col. 581, Twentieth Century Fox Film v. Bouve, supra).

The plaintiff's said works were copyrighted in their entirety; the pro tanto (or even complete) republication thereof thereafter in newspapers would not necessitate re-copyrighting: the greater includes the less. "If later, or better, reprints are published after copyright, there is no need to deposit copies of these, unless the work requires to be re-copyrighted" (Weil, supra, sec. 809 p. 317) (underscoring ours).

The inclusion in the one volume of King Features Weekly (plaintiff's Exhibit F) of a few items published prior to the publication of the volume as a whole would not preclude the securing of copyright upon that volume as a whole, as a new work - one containing old matter republished with new copyrightable matter (17 U. S. C. A. 6; Friedman v. Milnag Leasing Corp. et al., 20 Fed. Supp. 802); nor would it preclude the deposit of copies of the volume as a whole (the work upon which copyright has been secured) or the registration of plaintiff's claim to the copyright upon the volume as a "new work".

Plaintiff complied with Section 12 of the Act when it deposited in the mails, properly addressed to the Copyright Office, the copies of the volumes and its applications; said deposit was complete and effectual when so mailed (Maddux v. Grey, 42 Fed. (2) 441, 442; Weil, supra, sec. 799 p. 315).

Defendant contends that, under section 10 of the

Act, he cannot accept plaintiff's deposits or register plaintiff's claims because that section refers to "complying with the provisions of this title, including the deposit of copies". However, it is not for the register to decide whether plaintiff has complied with the provisions of the Act - that is exclusively the function of this court. If defendant could decide that question (as he has, in effect, attempted to do in the instant case), he would be exercising a judicial function, a function not conferred upon him by the Act (H. of Rep. Committee Report 2222 at p. 20).

It is submitted, the Act gave to the plaintiff the right to secure statutory copyrights in and to its literary and artistic material, as the person entitled thereto, by the publication thereof in bound volumes with notice of copyright duly affixed. Once plaintiff availed itself of that right, as it did herein, then as a corollary thereof, plaintiff became entitled to secure the registration of its claims to such copyrights and to the certificates thereof by the making of the deposit of two complete copies of the best edition then published of those bound volumes, and applying for such registration, as the plaintiff did herein. Compliance with the Act in respect of deposit of copies and registration is a jurisdictional requirement for the maintenance of an action or proceeding for infringement (17 U. S. C. A. 12, supra, and cases cited, supra, p. 32). Moreover, the certificate of registration is "prima facie evidence of the facts stated therein" (17 U. S. C. A. 55).

What the plaintiff did herein spells out compliance with express provisions of the Act; plaintiff is, therefore, entitled to the benefits of the Act accruing from deposit and registration. It is submitted, defendant's action should be coerced in the manner requested by plaintiff in its prayer for relief.

POINT IV.

PLAINTIFF IS ENTITLED TO THE RELIEF
HEREIN SOUGHT.

We submit, plaintiff is entitled, in the premises, to the injunctive relief herein sought (Twentieth Century-Fox Film v. Bouve, supra). However, if that be not so, then the plaintiff is entitled, in the premises, to a judicial declaration in its favor of its rights in this actual controversy together with further appropriate relief implementing such declaration under Title 28 U. S. C. A. Sec. 400.

Respectfully submitted,

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On the Brief and Memorandum

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

KING FEATURES SYNDICATE,

Plaintiff,

vs.

CLEMENT L. BOUVE,
Register of Copyrights,

Defendant

Civil Action No. 540.

BRIEF FOR DEFENDANT

It is the position of the defendant in this case that the relief sought by the plaintiff should be denied on two principal grounds:

1. The finding by the Register of Copyrights that the plaintiff has not complied with all of the provisions of the Copyright Act, including the deposit of copies, was correct.

2. The finding by the Register of Copyrights that the plaintiff has not complied with all the applicable provisions of the Copyright Act, including the deposit of copies, should not be overturned since the action of the Register in arriving at such determination was not arbitrary or capricious, but was supported by substantial evidence.

The defendant respectfully suggests that the Court, throughout its consideration of this case and in respect of every part of the case, should not lose sight of the undoubted motive of the plaintiff to avoid payment of fees clearly required by the intentment of the Copyright Act. The circumstances attending the so-called publication of plaintiff's exhibits A, B, C, D, E, and F and the history of plaintiff's dealing with the Copyright Office make this motive all too apparent.

At the outset of this discussion it may be well to point out the differences between this case and the case of Twentieth Century-Fox Film Corporation v. Bouve, decided by this Court last spring adversely to the Register of Copyrights. In the Twentieth Century case, the refusal of registration of Twentieth Century's work entitled "In Old

Chicago" was based mainly on the following grounds:

(A) That the material consisted in fact of an aggregation of proof sheets, each proof sheet containing a separate chapter of the story "In Old Chicago"; hence, that even if the material as aggregated constituted a book, it was not "a complete copy of the best edition of the book" within the meaning of Section 12 of the Copyright Act;

(B) That the material constituted a mere aggregation of proof sheets of twenty separate articles prepared for publication in and as contributions to newspapers, to each of which was affixed a separate copyright notice, and that the aggregation of such material between two covers could not change contributions to newspapers into a book for the purposes of deposit and registration under Section 12;

(C) That, irrespective of its proof sheet nature, the material submitted for registration really represented twenty contributions to newspapers and, hence, any deposit thereof would, by the specific mandate of Section 12, have to be the issues of the newspapers themselves.

During the trial of the Twentieth Century case, the Register of Copyrights also contended - as he does here - that his finding as to whether the plaintiff had complied with the requirements of the Copyright Act, and hence whether the deposits were of the nature required by the Act, was not subject to correction by the Court unless found by the Court to be arbitrary and capricious.

The Court decided, however, that the findings of the Register were not binding upon it and that the "findings of fact and conclusions of law on the part of the Register of Copyrights may be reviewed and, if erroneous, corrected by this court." The Court also found that the work, although apparently intended to be published in installments in periodicals and having a number of the characteristics of page proof, was a book within the meaning of Section 4 of the Copyright Act. An appeal has been taken by the Register of Copyrights from the judgment

of the Court in the Twentieth Century case, and he urges here in the instant case all of the contentions advanced in the Twentieth Century case. This case differs from the other, however, in the following important particulars:

(A) Application for registration was made by King Features on the basis that the six volumes - the five King Features Illustrated Weekly volumes and the single volume of King Features Weekly - were composite works. The application for registration of "In Old Chicago" did not designate it as a composite work but merely as a book. Indeed, "In Old Chicago" could not have been designated as a composite work since it comprised a single novel, the continuity of which was apparent and unbroken.

(B) In the Twentieth Century case the claim was made, and the Court found that the so-called book had been published as such before any portion thereof had been published in the newspapers. In the instant case the defendant submits that he has established that something over 18% of the contents of the volume of King Features Weekly was published in newspapers by or before the date on which King Features claims that the Weekly was published. The importance of this fact is that upon publishing for the first time with copyright notice in newspapers of any article contained in King Features Weekly, the duty arose promptly to make deposit of the issue of that newspaper with the appropriate application for registration and a fee of \$2.00, and that this obligation could not be avoided by the copyright owner by the subsequent publication of King Features Weekly even had it constituted a true composite work. Section 12, Copyright Act.

(C) In the Twentieth Century case the clear motive of avoidance of fees, which is present in this case, was not so apparent as in the instant case.

I

THE FINDING OF THE REGISTER OF COPYRIGHTS WAS CORRECT

Plaintiff's Exhibits A, B, C, D, E and F are not Composite Works

Section 5 of the Copyright Act provides that composite works may be copyrighted. The term "composite work" is not defined in the Act, and would need no definition except where, as in the instant case, the term is employed for the purposes of evading the obvious intentment of the copyright law.

A composite work, to be a literary work at all within the meaning of the Copyright Act, must be the result of a process of selection and arrangement to which authorship may be attributed; otherwise it is not copyrightable as an entirety, being devoid of the characteristics of authorship, since it is only the writings of authors which are protected by the Copyright Act (Section 4), or which Congress may protect under the Constitution. If there is no selection and arrangement reflecting intellectual effort, the result is not a single work, but an aggregation of many separate works. Authority for the above stated definition of the term "composite work" is contained in many cases and in the writings of copyright authorities, relevant excerpts of some of which are set out herein.

In the case of Lawrence v. Dana, Fed. Case No. 8136, decided in 1869, Circuit Court for the District of Mass., the court said:

"Copyright may justly be claimed by an author of a book who has taken existing material from sources common to all of our writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that, in doing so, he has exercised skill and discretion in making the selections, arrangement and combination, and in having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement, as provided in the Copyright Act. Books 'made and composed' in that manner are the proper subjects of copyright; and the author of such book has as much right in his plan, arrangement and combination of materials collected and presented as he has in his thoughts, sentiments, reflections and opinions, or in the modes in which they are therein expressed and illustrated."

"New materials are certainly the proper objects of copyright; and old materials, when subsequently collected, arranged and combined in new and original form are equally so; and in either case the plan, arrangement and combination of the materials are as fully protected by the copyright as materials embodied in the plan, arrangement and combination."

In Weil on Copyright, it is stated at Page 172 that -

× "Composite works mean those consisting of matter drawn from various different sources or contributed by different authors * * *. The term composite works seems inclusive enough to cover all compilations, provided that they consist of several distinct parts drawn from separate sources."

Again, at Page 179, the author states:

× "A proprietor of composite works can only copyright such works as an entirety if he has shown selection and arrangement in assembling the whole, except as to those parts of which he is the author or proprietor, which he can, of course, copyright for other reasons."

In the case of Emerson v. Davies, Fed. Case No. 4436 (C.C.D. Mass.

1845), Mr. Justice Story discussed the question of whether the book belonging to the plaintiff in that litigation contained anything new and original entitling him to a copyright, which could be obtained as to old materials only if they were combined in a "composite work."

The court said:

"The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose, or for any other purpose. * * * If his plan and arrangement are real improvements upon the existing modes, he is entitled to a copyright in the book embodying such improvement. * * *

"He who constructs by a new plan an arrangement and combination of old materials in a book designed for instruction, either of the young, or the old, has a title to a copyright, which cannot be displaced by showing that some part of his plan or arrangement or combination has been used before."

After indicating in the above quoted language the necessity of an arrangement and plan in the putting together of a composite work, Mr. Justice Story concluded that "plaintiff has a good copyright in his book; that taking his plan, arrangements, lessons, examples and illustrations, as a whole, they are not to be found combined in any former work."

Mr. Justice Story, in the case of Gray v. Russell, Fed. Case No. 5728 (C.C.D. Mass. 1839), again emphasized the necessity of arrangement and plan in a composite work, saying:

× "Any compilation may be the subject of a copyright, provided the plan, arrangement and combination of the materials be new * * *

" * * * the preparation and collection of these notes from these various sources must have been a work of no small labor and intellectual exertion. The plan, the arrangement

and the combination of these notes in the form in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is, then, fully to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly. * * *

"Blackstone's Commentaries is but a compilation of the laws of England drawn from authentic sources, open to the whole profession; and yet it was never dreamed that it was not a work, which in the highest sense might be deemed an original work; since never before were the same materials so admirably combined, and exquisitely wrought out, with a judgment, skill and taste absolutely unrivalled."

In Atwill v. Ferrett, Fed. Case No. 640 (C.C.S.D. N. Y. 1846), the court said:

"To constitute one an author, he must by his own intellectual labor, applied to the materials of his composition, produce an arrangement or compilation new in itself."

The above quotation aptly points to the defendant's contention in this case that the volumes in issue are not composite works since the arrangement of the material is not the result of the intellectual labor of an author but is merely the result of haphazard aggregation of materials with no other plan than that of their chronological appearance in the newspapers in which they were destined to be published and were in fact published.

A literary work, like any other piece of work, must be the result of an effort at achieving an integrated whole - of effort devoted to the establishment of a unified plan or arrangement. The accumulation of material in the volumes before the Court is simply an assemblage of 423 separate works, with respect to each of which the syndicate, by affixing a separate copyright notice, informs, first the Copyright Office, and later the general public through the newspapers, that it claims a separate copyright. The only purpose which could have motivated King Features in following such a course obviously was to avoid separate registration of each of the works and the resulting payment to the Government of the fees due.

A case close to the instant one so far as the nature of the volumes in issue are concerned was Banks Law Publishing Company v. Lawyers' Cooperative Publishing Company, 169 Fed. 386, C.C.A. 2, 1909,

in which the Court of Appeals quoted the trial judge as follows:

"It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing), and paging the volumes - things essential to be done to produce the volumes - are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter."

The Court of Appeals then stated:

"We concur with Judge Hazel in his reasoning and conclusion that the arrangement of reported cases in sequence, and paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details."

In the case of West Publishing Company v. Edward Thompson Company, 176 Fed. 833, C. C. A. 2, the plaintiff was a publisher of reports of cases and of legal digests. This work began in the year 1879 with the publication of weekly reporters and gradually grew into what is known as the "National Reporter System", covering the decisions of all the highest courts throughout the United States. Describing the works, the court said:

"Each weekly number of the Reporters was copyrighted. Then several such numbers were aggregated into a volume which was copyrighted. The head notes of the cases in the National Reporter System were gathered into monthly or bi-monthly digests, and these again into annual or semiannual digests; these again into the American Annual Digest; and these again down to 1896 with the syllabi of the United States Digest, First and New Series, into the Century Digest under one alphabet. Generally speaking these books, consisting of some six hundred volumes of reports and ninety-nine volumes of digests, were copyrighted."

The court found, however, that the mere aggregation of the weekly law reporters, which had been singly copyrighted, into volumes did not constitute a new work which required a new copyright, stating:

"Section 6 of the Act of 1909 (Act March 4, 1909, c. 320, 35 Stat. 1077), which is obviously declaratory, seems to confirm Justice Clifford's view that there is but one copyright of the same book, that additions and improvements make a new book, and that the only notice required is that the date of entry of the last edition. It is as follows:

"Section 6 (compilations, etc. of works in public domain, etc., - subsisting copyrights not affected) - that compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent

of the proprietor of the copyright in such works, or of works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or ascertain copyright in such original works."

"The mere aggregation of the Weekly Reporters into volumes does not in our opinion constitute a new work. But the compilation and re-arrangement and reclassification of the syllabi in the digests into new and larger digests do constitute new works entitled to copyright but need only notice of their entry for copyright."

The defendant submits that the above-quoted authorities clearly establish that it is a recognized principle of American copyright law that when, as is the case here, the claimed copyright in the book is based upon the work of compilation or composition of the alleged "composite work", the right to obtain copyright protection must be based, not upon the mere aggregation or accumulation of material, but upon the true intellectual work of selection and arrangement. This intellectual effort is the very essence of copyrightability. It is lacking in King Features Weekly and the five volumes of King Features Illustrated. What the plaintiffs have done was to purchase from various writers the articles contained in the volumes and from artists the comic strips contained therein, contract for the sale of the material every week to newspapers, and take the weekly hodgepodge, without the slightest regard for arrangement or combination; put it between two covers and call the result a composite work. The arranging of the material according to the dates it is to be released to the newspapers and the stitching of it together can hardly be called an intellectual effort. The obvious purpose of this physical aggregation of material between two covers is to avoid the payment of copyright fees for each individual article. The claim that each of the volumes is a composite work cannot have been made in good faith but apparently

was for the deliberate purpose of evading payment of copyright fees to the Government.

The defendant contends that the volumes themselves and the admitted facts concerning them clearly establish that they are lacking in any plan or intellectual arrangement.

An examination of volume one of the Illustrated Weekly discloses that the sequence of the material is based merely on the newspaper release dates from October 9 to October 15 printed on each strip, such as "10 - 9", "10 - 12", et cetera. Plaintiff's Production Manager, Mr. Donald, has admitted that these figures represent newspaper release dates and their significance has been further confirmed by the stipulation of the plaintiffs concerning the dates upon which the comic strips and other material actually appeared in newspapers.

The arrangement in volume two of the Illustrated Weekly is precisely the same as in volume one.

The same is true of volume three. Where the release dates do not appear upon the individual contributions to newspapers, admissions by plaintiff as to the dates of their appearance in the newspapers prove that the only arrangement is chronological.

The same is true in volume four and is proved by the release dates appearing on the contributions, the admitted release dates of contributions not carrying release dates on their faces, and by such statements as, in the articles on Bridge, "Tomorrow's Hand", "This Week's Brain Twister", "Solution to Last Week's Brain Twister", "Sunday X Word Puzzle No. 724, Rel. October 23. Herewith find solution to puzzle No. 724, published last Sunday."

The same is true of volume five as indicated by the numerical release dates on the face of some of the contributions and the admitted release dates of others.

Although the articles contained in King Features Weekly, with a few exceptions, are undated, a cursory examination will disclose that they are of only transient interest and suitable only for timely publication. Here, again, the stipulation as to the release dates indicates that the arrangement has reference only to the chronology of the publi-

cation of the articles in newspapers.

The United States Court of Appeals for the District of Columbia and the Supreme Court have, on three occasions, considered similar attempts, under the postal laws, to disguise the nature of publications in order to save fees. The cases are Payne v. Houghton, 22 App. D. C. 234, Affirmed, Houghton v. Payne, 194 U. S. 89; Payne v. Bates & Guild Company, 22 App. D. C. 250, Affirmed, 194 U. S. 108; Hitchcock v. Smith, 34 App. D. C. 521, Affirmed, Smith v. Hitchcock, 226 U. S. 53.

All of the above-cited cases arose under the sections of the postal laws concerning classification of mail matter. The relevant sections of the law are as follows:

"Sec. 7. That mailable matter shall be divided into four classes:

- "First. Written matter.
- "Second. Periodical publications.
- "Third. Miscellaneous printed matter.
- "Fourth. Merchandise.

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in Sections 12 and 14.

"Sec. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with the postage at the rate to which the enclosed matter is subject; Provided, that nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear date of issue and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets without cloth, board, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and have a legitimate list of subscribers; Provided, however, that nothing herein contained shall be so construed as to admit to the second class rate

no protecting copyright, it may be re-published verbatim under its original title with the addition of a number of

regular publications designed primarily for advertising purposes, or for free publications, or for circulation at normal rates."

In Payne v. Houghton, the Houghton, Mifflin Company had, for sixteen years, sent their publications of the "Riverside Literature Series" through the mail as second class matter. Despite the long practice of admitting the Riverside Series to the mail as second class matter, the Postmaster General cancelled the second class permit and the publishing company sought mandatory relief. The court found that the volumes of the Riverside Literature Series complied with the conditions of Section 14, quoted above, in that they were regularly issued from a known office of publication at stated intervals, as frequently as four times a year, bore a date of issue, were numbered consecutively, were formed of printed paper sheets, without board, cloth, leather or other substantial binding such as distinguish printed books for preservation from periodical publications and that they were for dissemination of information of a useful character, or devoted to literature, and had a legitimate list of subscribers.

Each of the books, however, consisted of a single well-known literary work such as Henry Esmond, Plutarch's Lives of Alexander, and others. Although the publishing company brought to the attention of the court that it was liable under existing contracts to supply upward of two million copies of these publications at a price based upon the postage rates charged for second class matter and that it would sustain great loss if it had to pay the higher rates charged for third class matter, which latter class included books, the court held that the volumes were books and not periodicals, saying:

"Henry Esmond, when given to the world by the genius of Thackeray in 1852, and, whether issued by the publisher in paper covers or with board, cloth, leather or other substantial binding, was a book in every sense of the word. Re-published singly at any time since the enactment of the present postal law and mailed, either bound or unbound, it has been and is now unquestionably subject to postage as matter of the third class.

"Does it become any the less a book when, there being no protecting copyrights, it may be re-published verbatim under its original title with the addition of a number of

a named series consisting of books by other authors, numbered consecutively and issued at stated periods, not less than four times a year?

"Can the well-known book lose its identity and become completely merged in a periodical publication through the adoption and the imprint of these additions?

"Surely Congress could have contemplated no such possibility when it undertook the complete classification of mail matter, putting books in one class and periodical publications in another."

The court made it plain that, in passing upon the merits of the controversy before it, it did not deny that classification of mail matter by the Postmaster General was a function requiring judgment and discretion and hence not subject to judicial control.

The same day the court decided Payne v. Houghton, it also handed down its opinion in Payne v. Bates & Guild Company, supra, in which latter case it refused to go into the merits of the case, but placed its decision squarely upon the proposition that the decision of the Postmaster General was not a ministerial act, but involved judgment and discretion. It is clear from a reading of both cases that the two cases combined stated the law, as the court saw it, concerning the function of the Postmaster General in classifying mail matter.

In Payne v. Bates & Guild Company, the publishing company sought to enjoin the Postmaster General from excluding its publication entitled "Masters in Music, a Monthly Magazine" from classification as second class mail matter. The series was new and only the first issue of it was before the Postmaster General. That number contained a brief biographical sketch of the musician Mozart, some critical notes, and thirty-two pages of sheet music selected from the compositions of Mozart. The Postmaster General found that the publication was not a periodical, but merely an aggregation of sheet music and, as such, was not entitled to the reduced rates available for second class matter. The court said:

"When application was made to the Postmaster General, the question was one that unquestionably demanded the exercise of discretion in deciding it. As but one number had been issued, and that stripped of its cover with the

designation of magazine, would have all the appearance of an unbound book. The facts relating to the contents of future numbers could only be obtained from the representations made by the publishers. Whilst he may undoubtedly accept these representations in the case of a new publication, when satisfied with the conformity of the first number, he is not bound to do so. If not satisfied, he could insist upon a literal compliance with all of the conditions of Section 14 before taking final action.

* * * * *

"We are of the opinion that the decision required of the Postmaster General in the application of the complainant was not a mere formal or ministerial act. As was said in the recent case of *United States ex rel. Riverside Oil Company v. Hitchcock*, 190 U. S. 316, 47 L. Ed. 1074, 23 S. Ct. Rep. 698: 'Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction * * * If this writ were granted, we should require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law and we should require him to come to a determination upon the issues involved directly opposed to that which he had reached, and which the law conferred upon him the jurisdiction to make * * * The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.'"

Following the example of the Court of Appeals, the Supreme Court also treated the Houghton case and Bates and Guild Company case as related cases, deciding the Houghton case on its merits and affirming the Bates & Guild Company case upon the ground that the court would not compel the doing of an act involving the judgment and discretion of an administrative officer.

The Supreme Court, in the Houghton case, agreed with the Court of Appeals that the Riverside Literature Series complied with all of the conditions of Section 14, ^{and} ~~but~~ said that Section 14 laid down certain conditions requisite to the admission of a publication as second class mail matter ^{but} ~~it~~ did not define a periodical. Concerning the definition of a periodical the court said:

"While it may be difficult to draw an exact line of demarcation between periodicals and books, within which latter the Riverside Literature Series falls, if not a periodical, it is usually, though not always easy to determine within which category it falls if the character of a particular publication be put in issue."

Deciding that the volumes of the Riverside Literature Series were books and should have been entered as mail matter of the third class, the court said:

"The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe, that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they were so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all the other characteristics are those of books rather than magazines."

In the Bates & Guild Company case, decided by the Supreme Court the same day as the Houghton case, the court constantly referred to the Houghton case and accepted without supporting argument the principle that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of Section 14. Despite this principle, the court said, cases may still arise where the classification of a certain publication may be one of doubt. The court said the classification of the series Master in Music was a doubtful case, adding:

"But we think that although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong. The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied.

* * * * *

"Although a comparison of the exhibit of the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him, so that the question involved would not be found merely a question of law, but a mixed question of law and fact. While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final."

It should be noted that Justice Bailey in Twentieth Century Fox Film Corporation v. Bouve found that the function of the Register

of Copyrights in determining the nature of a work and the collateral question of how it should be registered was analogous to the Postmaster General in classifying mail matter.

In Hitchcock v. Smith, a publishing company attempted to enjoin the Postmaster General from revoking an order of long standing permitting entrance of a publication entitled "Tip Top Weekly" to second class mailing privileges. Each volume of this publication, as in the preceding cases discussed, conformed to the letter of Section 14, but the court likewise decided that they were not periodicals, but were, in fact, books. Each volume was a so-called dime novel of the Frank Merriwell series.

"The real question in this case," said the Court of Appeals, "is whether the external or the internal characteristics of a given publication shall control in determining the classification of ^{a given} that publication for transmission through the mails, whether a novel is entitled to go through the mails as matter of the second class, because it has been preceded and will be followed by another novel by the same author and related to the same hero or characters."

The court then concluded:

"We are not able to distinguish the issues of this publication from the ordinary and every-day understanding of the term 'book', and think it apparent that they are not entitled to be transmitted in the mails at second class rates. We are certainly not prepared to hold that the exercise of the judgment and discretion of the postal authorities should be disturbed."

In affirming the decision of the lower court, the Supreme Court quoted with approval the statement in Bates & Guild Company v. Payne that the court should not interfere with the decision of the Postmaster General unless clearly of the opinion that he was wrong, and then said it had no such clear opinion, deciding on the contrary that he was right and that the weeklies were books rather than periodicals. The court said:

"As books are not turned into periodicals by number and sequence, the magazines are not brought into the third class by having a considerable number of pages stitched together."

The defendant submits that the six decisions concerning the classification of mail matter by the Postmaster General are controlling in the instant case and that the court should look beyond the external form of the publication, as did the Register of Copyrights and decide that their internal nature makes it plain that they are merely aggregations of contributions to periodicals. The cases just discussed certainly are ample authority for the Register's action in this case.

King Features, itself, has admitted in some 14,000 instances that material of a similar nature to that incorporated in the volumes it now seeks to register, constitutes contributions to periodicals. The records of the Copyright Office show that during the years 1916 through 1934, the plaintiff registered, as contributions, 11,099 separate newspaper articles, some of them written by the same authors and bearing the same titles as articles incorporated in the volume of King Features Weekly now before the court. During the same period, the plaintiff registered separately 3,609 comic strips as contributions to periodicals. A glance at the list of the names of the comic strips so registered shows that they are the same type of material, and often strips of the same names as those appearing in the volumes of King Features Illustrated Weekly. The defendant submits that no better proof of the intrinsic nature of the volumes in issue could be had than these admissions by the plaintiffs.

PRE-PUBLICATION OF TWENTY-TWO OF THE CONTRIBUTIONS

An examination of the stipulation of plaintiff concerning the publication dates of the various articles contained in King Features Weekly indicates that no less than twenty-two actually were published in newspapers on or before October 6, 1938 - date on which the plaintiff stated in its applications for registration that the six volumes were first published. It will be noted that each of these articles, as contained in the volumes in issue, had affixed to it the notice "Copyright King Features Syndicate, Incorporated, 1938."

From this it is evident that these twenty-two articles, when they were put on sale in the volumes, already had been copyrighted prior to that time. This further emphasizes that the only copyright King Features possibly could obtain in the volume which contained the twenty-two pre-published articles was a copyright as a composite work (assuming arguendo that the volume reflected the intellectual effort of an author).

was produced by the defendant that in twenty-two similar volumes for which registration of claim of copyright was requested, articles

Immediately upon publication in newspapers of these twenty-two articles the duty arose for the copyright owner—King Features Syndicate—to deposit one copy of a newspaper in which each article appeared, together with a \$2.00 fee and an application for registration of the claim of copyright obtained therein. Section 12, Copyright Act.

In this connection it should be remembered that the Copyright Office requested that the proper applications and deposits be made, together with the fees required by the Act, in respect of the material contained in the volumes, but that the plaintiff refused to make such deposits, applications, and payments, and in lieu thereof insists that the Register of Copyrights accept a single deposit, one application for registration and a fee of \$2.00 instead of the \$44.00 which should be paid for these twenty-two contributions alone. The material pre-published in newspapers consists of four contributions under the title "The Human Side of the News," by Edwin C. Hill, published in newspapers October 3, 4, 5, and 6; four contributions under the title "Clem McCarthy at the Races," published October 3, 4, 5, and 6; six contributions under the title "Behind the Make-Up," by Erskine Johnson, published on September 26, 27, 28, 29, 30, and October 3; four under the title "A Woman's New York," by Alice Hughes, published October 3, 4, 5, and 6; three by Donna Grace, published on October 4, 5, and 6; and one under the title "I'm Telling You," by Dan Parker, published September 27.

actual truth, which is, of course, that the material was not prepared for any purpose other than publication in newspapers. The purpose for which the material was produced is further shown by the fact that

Why this material was included in King Features Weekly is not clear. Plaintiff's Production Manager, Mr. Donald, testified that it was included by accident. The credibility of this testimony is so seriously impaired, however, by the defendant's evidence that the same sort of accident occurred on sixty-two other occasions, as to render his explanation untenable. The Court will recall that evidence was produced by the defendant that in sixty-two similar volumes for which registration of claim of copyright was requested, articles appeared which had been published prior to the so-called publication date of each of the volumes.

The Lack of Bona Fides in the Publication

The defendant respectfully submits that the Court cannot read the Court that the purpose of such material is to serve the appetites any of the material contained in the six volumes without realizing that they are composed, in fact, of contributions to newspapers, and that the question of the bona fides of the publication of these contributions in volumes cannot be disassociated from consideration of what is their obvious and natural purpose--dissemination to the public through newspapers. Evidence introduced by both parties to this suit has shown clearly that the material contained in the volumes is the same which is sent to the newspapers by King Features. If the primary purpose of producing the material contained in the volumes were not its ultimate publication in newspapers, the material would not bear release dates and it would not be necessary for King Features to attempt to deceive the Copyright Office by obliterating the release dates, in some instances, of the material placed in the volumes. Apparently, King Features believe that a notice as to release date at the top of each article would be a red flag which even the Copyright Office could not overlook; its presence would tell too plainly the actual truth, which is, of course, that the material was not prepared for any purpose other than publication in newspapers. The purpose for which the material was produced is further shown by the fact that

in a number of instances King Features actually left instructions to the newspaper printer upon some of the pages in the volumes of King Features Weekly. These instructions concern the kind of type to be used, where it was to be used, where to stop using it, and at what places certain numbered cuts or pictures were to be published in the newspaper. Clearly such instructions would have no place in material intended to be disseminated in its existing form to the public.

The comparatively brief time which elapsed from the date of the alleged publication of this material in volumes as "composite works" and the dates when it served its real purpose of publication in the newspapers further emphasizes that no true publication was accomplished by the "publication" of the "composite works." It must be obvious to the Court that the purpose of such material is to serve the appetites of millions of the reading public. This end could only be reached by publication in newspapers. The value of the material to the public lies in its first reading, since the material plainly is not such as would be reread. Therefore, if the "publication" of the material in the volumes effected any real dissemination to the public, the newspapers would have no reason for going to the expense of buying the same material and using it for a bait for a public whose hunger with respect to any particular issue of such material already had been satiated. This is particularly true of the newspapers in the three communities where the volumes were exposed for sale. The defendant, therefore, considers the short period which elapsed between the alleged "publication" of the "composite works" and the date of the publication in the newspapers to be strong proof that the first so-called publication was purely colorable.

King Features is a large syndicate, the purpose of which is to return a profit to those interested in it. This purpose certainly would not be furthered by the publication and sale at a considerable

loss of the three sets of volumes concerned in this suit. That the plaintiff sustained a loss has been definitely established, for, in addition to the cost of production, plaintiff paid amounts in postage in excess of what was returned to them as the proceeds of sales of the volumes. It must be, then, that the only purpose for which the volumes were put on sale was to meet what the plaintiff conceived to be the registration requirements of the law.

Finally, cumulative of the above considerations, it cannot be denied that in Section 62 of the Copyright Act it is provided that the date of publication shall be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority.

Section 12 provides that "after copyright has been secured by publication of the work with the notice of copyright as provided in Section 9 of this Act there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published"; and Section 59 shows that the purpose of deposit is to enable the Librarian of Congress to determine what books and what articles shall be transferred to the permanent collections of the Library of Congress, including the Law Library, etc. It seems plain that when Congress spoke of publication what it had in mind was the publication of an edition in the case of books, and that the word "edition" as so used should constitute material normally adapted to the needs of the Library of Congress and the purposes thereof as set out in Section 59. It seems incredible to suppose that when Congress spoke of a "best edition," it could have meant an edition consisting of printer's copy or page proof of material which was designed and intended to be later published in a form which would meet the needs of the reading public, and hence be of value to the Library of Congress. If the above assumption is correct, it seems fair to

conclude that Congress in using the term "publication" did not intend to refer to publication of proof material, for under such construction it would be depriving itself of ever receiving for the purposes of the enrichment of the Library what every man and what doubtless every Congressman who participated in the enactment of the statute had in mind when it used the term "best edition."

Finally, cumulative of the above considerations, it cannot be conceded that Congress had in mind a publication the necessary effect of which and really the only intended purpose of which was to deprive the Government of maintaining a record of separately copyrighted material or of scores of thousands of dollars of fees to be paid in connection with such registrations.

The Volumes Offered for Deposit by King Features are Composed of "Proof" of Contributions to Periodicals, and, as Such, are not the Deposits Intended by the Copyright Act

That the five volumes of King Features Illustrated Weekly are composed of page proof is clearly demonstrated both by the plaintiff's and the defendant's evidence. Each page is the product of an intermediate stage of printing. Mr. Donald, production manager for the plaintiff, who, through inadvertence, called the pages in the volumes, proof, as they actually are, testified that they were printed from photo-engravings. From these same photo-engravings, he said, were made the matrices and the accompanying proof sheets which were sent to the newspapers for reproduction in the newspapers of the matter contained therein. He admitted that the only difference in the production of the proof sheets sent to the newspapers and the so-called final product which was bound into the volumes of King

Features Illustrated Weekly, was that greater care was used in taking the impressions for the Illustrated Weekly than for the sheets which went to the newspapers. Mr. McLean and Mr. Burr, printing experts from the Government Printing Office, who testified for the defendant,

established beyond question, it is submitted, that the purpose for which the photoengravings were produced was the making of the matrices which were sent to the newspapers, and that, had they been intended to be used to print a finished product, dead metal, and other characteristics of an intermediate stage of printing would have been removed. Instead, these characteristics were merely covered over in an obvious attempt to disguise the manner in which the pages of King Features Illustrated Weekly were produced.

The intermediate nature of the sheets which were bound together to constitute a single volume of King Features Weekly is even more apparent than in the case of the Illustrated Weekly, since Mr. Donald admitted that they were made from the same mimeograph stencils and in precisely the same manner as the "copy" which was sent to the newspapers, except that, after the copy destined for the newspapers had been run off, with release dates thereon, the release dates were blocked out on the stencil so that they would not show on the copies to be bound into volumes.

The plaintiff contends that since the volumes sent to the Copyright Office as deposits were the only existing edition at that time of the so-called composite works, they were the best edition. This argument, however, is based upon the false premise that when aggregations of written or illustrated text matter are placed on sale before the material fulfills its obvious purpose of publication in the newspapers, such placing on sale must constitute a publication, and the material itself an edition within the meaning of the Copyright Act.

The real question here is whether the material that was placed on sale was in the form which Congress, in Section 12, demanded for deposits.

Viewed in the light of what it really is, that is, submitting it to the test suggested by the Court of Appeals in the case of Payne v. Bates & Guild Company, 22 App. D. C. 250, 251, of stripping the material of its cover, the material frankly is proof and newspaper "copy." Each of the contributions bears a separate copyright notice, which amounts to a separate claim of copyright in each. As to the appropriate deposit for such material, Section 12 leaves the Register no choice, specifically stating that the deposit shall take the form of the issue of the newspaper which contains the contribution.

Even if it were conceded, which it is not, that there was a bona fide publication and that each of the volumes was a composite work, the Register would have to decide whether or not the volumes were the "best edition," that is, whether such material as was contained in the volumes was what Congress wanted the Library of Congress to receive by way of deposit. *Library of Congress, including the law library, and to receive by way of deposit. articles shall be placed in the reserve collections of the library of Congress for sale or exchange, or to be transferred to other*

Put in another way, when Congress, in attempting to define what it wanted the Library of Congress to have, used the term "two complete copies of the best edition," did it mean "two proof copies placed on sale before the first edition is issued to the public"? *the Register,*

the Librarian of Congress, in examining such material for the purpose
Of course, the answer is that when the legislation was enacted of drawing it up into the Library, would be limited to the choice of Congress did not contemplate an attempted evasion of the law such as selecting page proof material or not obtaining the book at all, for is now before the Court. Had Congress intended that proof copies might be received as a "best edition," an encyclopedia intended to sell to the public for \$500, and to be published with copyright notice on a cheaper, though genuine, edition has been submitted as a deposit June 1, 1941, might be placed on a book stand in page proof form and merely offered for sale on May 15. A few days later two copies of this page proof of the valuable work could be sent to the Copyright Office for deposit and would have to be accepted for registration since it would be the only "edition" published at the time the application for

registration was made, and would necessarily be the "best edition." Such a construction of the law certainly would jeopardize, if not defeat, the purpose of Section 59 of the statute which was held in Washington Publishing Company, Inc., v. Pearson et al, 305 U. S. 30, and Mittenthal, Inc., v. Irving Berlin, Inc., et al, 291 Fed. 714, to be the enrichment of the Library of Congress. Congress could not have intended, when it provided for the enrichment of its own Library, to set up a system which would result in the placing of proof, rather than good editions, upon the Library shelves.

Section 59, which clearly sets out the purposes of the deposits, provides as follows:

"Of the articles deposited in the Copyright Office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the Law Library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or to be transferred to other governmental libraries in the District of Columbia for use therein."

It is needless to point out that if the obligation to accept such material as is offered by King Features rested upon the Register, the Librarian of Congress, in examining such material for the purpose of drawing it up into the Library, would be limited to the choice of selecting page proof material or not obtaining the book at all, for there is no obligation on the part of the copyright claimant to submit to the Copyright Office an expensive edition of a book once a cheaper, though genuine, edition has been submitted as a deposit with an application for registration of claim to copyright.

If the Library is bound under the Copyright Act to accept on July 1, for instance, the page proof of any popular novel, such as "Gone With the Wind," three things at once become apparent. First,

all the Librarian has obtained for the permanent collections of the Library is page proof material, which Congress could not have considered the proper subject of the permanent collection of the Library; second, having accepted such page proof on July 1, the Librarian might find himself in the difficult position of attempting to sell or exchange on August 1 page proof material in the face of the fact that on August 1 a regular bound edition of the book had already been placed on the market. In such event, the page proof would, of course, be useless for purposes of sale or exchange. Moreover, to obtain the regular edition of the book, the Library would have to pay the retail price of the copy of the first real edition—a situation obviously contrary to the intentment of the Act that the Library and the people of the United States should be supplied with two copies of a regular edition without payment; and third, there would be no opportunity to distribute such page proof material to other libraries in the District of Columbia, since it is not probable that such other libraries would find it practicable or convenient to give space on their shelves to page proof.

There is no statutory provision in the Copyright Law to support the plaintiff's contention that the mere fact of publication, in all cases, results in an "edition," as the term is used in Section 12. There also is nothing to support the contention that the selling of proof sheets of material in order to avoid the payment of copyright fees makes the matter sold an "edition" in the statutory sense. Finally, there is nothing whatsoever to support the view that the proof sheets of a book can constitute the "best edition" of the book within the meaning of the statute, since the usual meaning of the word "best edition," coupled with the purpose of deposit so clearly announced in Section 59 of the Act, definitely forbids such a construction.

The Meaning of the Phrase in Section 12, "Contribution to a Periodical, for which Contribution Special Registration is Requested."

Section 12 provides that "after copyright has been secured by publication of the work with notice of copyright as provided in section nine" deposit and registration shall be promptly made; and that "no action or proceeding shall be maintained for the infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

And Section 13 (always to be construed together with Section 12), (Report No. 2222, 60th Cong., 2d Session, to accompany H. R. 28192, which became the present Act, p. 11; The Washingtonian Publishing Company, Inc., Petitioner, v. Pearson, et al, supra) provides that:

"should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work"

demand such deposit of the copyright owner who, if he fails to meet such demand,

"shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

By necessary implication a contribution to a newspaper is a work subject to copyright, and hence subject to all the provisions of sections 12 and 13.

The copyright owner of a contribution to a newspaper can be subject to this mandate and to the sanctions of Sections 12 and 13 only after the contribution has been published in such newspaper.

But this does not mean that a newspaper article cannot be a newspaper article until publication in the newspaper, any more than that a book cannot be a book before publication as a book. They are

two different types of works and are recognized as such in Section 12. In other words, I can write an article for the Washington Post on diet. In my hands it is a newspaper article—in the hands of the editor it is a newspaper article on Monday when he receives it just as much as it is on Wednesday when he publishes it. It never ceases to be a contribution to a newspaper, and remains such although the editor may reject it and send it back to me without publishing it, in which case it is a rejected contribution to a newspaper.

Now if the contribution is accepted and published in the newspaper and the newspaper itself bears a blanket copyright notice, that contribution is protected by that notice provided that such was the intention of the parties. If it was not so intended, and the right to copyright was retained by the author, who, making the editor his agent for publication only, did not instruct him to affix a specific copyright notice to the article itself, the article goes into the public domain (Holmes v. Hurst, 174 U. S. 82). If the right to copyright the article did pass by contract from the author to the publisher who publishes it without a separate copyright notice but whose newspaper carries a blanket copyright notice, then the contribution is protected by that blanket copyright, and there is no need for special registration of the contribution itself; for registration as to it has been effected by the registration of the copyright of the newspaper.

But Congress recognized in Section 12 that there are many cases in which the author of the contribution wants the contribution to be copyrighted in his name. This is, of course, effected by publication of the contribution in the newspaper with copyright notice in his name; and if this is done, there at once comes into being a term of copyright, of which the author is the owner, which begins to run on the date of the publication of the newspaper. But the moment

that occurs the author is subject to the mandate of Section 12 to make prompt deposit and registration of this work in the Copyright Office. It is this situation which is considered by the Copyright Office to be reflected by the expression "contribution to a periodical for which special registration is requested"; in which case, under the terms of Section 12, only one copy of the work need be deposited.

This view is clearly reflected by one of the foremost contemporaneous American authorities on copyright who explains the clause "special registration is requested" in the following terms:

"In certain exceptional cases, one copy only of the work need be deposited. The first of these cases is that of contributions to periodicals for which 'special registration is required.' The deposit shall consist of one copy of the issue or issues containing such contribution. 'Periodicals' include newspapers, according to section 5. Thus the complete number of the periodical or newspaper is to be deposited and not only the clipping of the contribution alone. The words 'special registration is requested' refer to the case when, apart from the general copyright affecting the periodical or newspaper, it is sought to claim individual copyright in the contribution. As seen, the general copyright on the contents of the periodical or newspaper is taken out in the name of the publisher of the periodical or newspaper and covers all the articles therein in which he owns the copyright. If the publisher has only a license to publish a particular contribution, the general copyright will not cover such contribution. The author of the contribution must affix his own copyright notice to the contribution." Ladas, The International Protection of Literary and Artistic Property, Vol. II, pp. 757, 758.

To read Section 12 as meaning that the author of a contribution to a newspaper published with copyright notice in his name need only make deposit and registration if he personally sees fit to "request" special registration of the Copyright Office, would lead to absurd results opposed both to the words and spirit of the Act. To contend that he need not register his copyrighted work unless he wanted to would involve the following propositions:

(1) The authors of such works would become a privileged class who, alone among all classes of authors, were not under any obligation of deposit, registration, or payment of registration fee under the

mandate of Section 12.

(2) The final sentence of Section 12 would have to be read as if written with the added underlined phrase: "With the exception of works consisting of contributions to periodicals for which special registration is requested, no action or proceeding shall be maintained for the infringement of copyright in any work until the provisions of the Act with respect to the deposit of copies and registration of such work shall have been complied with."

(3) Section 13 would have to be changed by adding the following underlined exception:

"That should the copies called for by Section 12 of this Act, with the exception of copies of the periodical containing a contribution for which special registration is requested, not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them," etc.

App. D. C. 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"In the construction of this title, the word 'periodical' shall be applied only to publications of a regular character, and not to books or pamphlets, and no article or article of merchandise shall be entered under the Copyright Act, but may be registered in the Patent Office and the Commissioner of Patents is charged with the supervision and control of the order of deposit of such works of literature, in conformity with the regulations provided for and as to be approved by the Commissioner of Patents, and there shall be paid any special fee of five dollars, or less, as may be determined by the Commissioner of Patents, for a copy of the record under the name of the proprietor of the work, to the person making the deposit."

THE COURT IS WITHOUT AUTHORITY TO OVERTURN THE FINDING OF THE REGISTER OF COPYRIGHTS

The Court in Twentieth Century-Fox Film Corp. v. Bouve held that the Register of Copyrights' determination whether or not the provisions of the Copyright Act had been complied with by applicant for registration of copyrights constituted a finding of fact by the Register but that the finding might be reviewed by the court and corrected if erroneous. With this conclusion of the court, the defendant here respectfully takes issue in that he contends that the court is without authority to overturn his finding unless it be arbitrary or palpably wrong.

The defendant submits that the cases of Allen, Commissioner of Patents v. The United States ex rel. The Regina Music Box Co., 22 App. D. C. 271, cert. den. 191 U. S. 570, 43 L. Ed. 306, and United States ex rel. Lincoln Highway Association v. Ewing, 42 App. D. C. 508, are applicable to this case and control it. In both cases owners of so-called labels sought to compel the Commissioner of Patents to register them but the court held that registration was not a mere ministerial act, but required the exercise of judgment and direction. Both cases arose under Section 63 of Title 17 U. S. Code, which provides:

"In the construction of this title, the word 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other article of manufacture shall be entered under the Copyright Law, but may be registered in the Patent Office. And the Commissioner of Patents is charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label in a trademark, \$5.00, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same."

The above quoted section was a part of the Copyright Act of June 18, 1874 (18 Stat. 79) and was retained after the enactment of the 1909 Copyright Act. This section was superseded July 31, 1939, by a law enacted that date transferring the duty of registration of labels to the Register of Copyrights (17 U.S.C. 64, 53 Stat. 1142). By the 1939 Act, Congress recognized again that the registration of labels is accomplished under the Copyright Law, and merely transferred the function from one official to another without changing the essential nature of the function.

It will be seen that the only language in Section 63 which may be construed as vesting the Commissioner of Patents with discretion to determine whether or not the article offered for registration is a label, is contained in the words, "and the Commissioner of Patents is charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints."

Certainly an equal discretion was vested in the Register of Copyrights, as to registration of claims to copyright, by Section 53 of the 1909 Copyright Act, which provides:

"Subject to the approval of the Librarian of Congress, the Register of Copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this title."

And again in Section 10 of the Copyright Act the Register of Copyrights is directed to issue a certificate of registration to those persons who have complied with the provisions of the law. Obviously, the Register of Copyrights must determine whether the provisions of the law have been complied with. Therefore, it will be seen that the Register of Copyrights, in granting or refusing registration of claims of copyright has at least as broad a discretion as the Commissioner of Patents

in registering labels, yet in the cases cited above, the Court of Appeals held that it would not interfere with the exercise of this discretion by the Commissioner of Patents.

In the Reising Music Box Company case, the company sought to compel by mandamus the Commissioner of Patents to register a label. The label was rectangular in outline and showed an ornamental design surrounding a blank space, oval in form, in which appeared the words "Regina", printed in large letters. In the description which accompanied the application for registration of the label, it was declared to be "a label to be used for music boxes", but there was nothing on the face of the label to indicate a limitation to that particular use.

The grounds for the Commissioner's decision refusing registration were quoted by the court as follows:

"The word 'label' itself necessarily implies that it is descriptive of the article to which it is applied, and this office has held that a print or label cannot be held to be 'for any other article of manufacture', within the meaning of the statute, unless it indicates that article^{***}. The indication must be in the print or label itself, and not merely in a statement made by the applicant accompanying it. The print or label is the thing which is registered, and its registrability must be determined by its intrinsic qualities (underscoring supplied), and not by some possible or contemplated use of it. All of the pictures registered by the Library of Congress and the arbitrary designs patented under the design law might be applied to china or other articles as ornamentations thereof; but a mere statement by the applicant that he intended to use them would clearly not warrant this office in registering them as labels for the articles mentioned. If such a statement of use by the applicant were permitted to determine whether the alleged print or

label should be registered in this office or in the Library of Congress, the distinction attempted to be drawn by Congress between the two classes of artistic products would be nullified.

It must be held that a label to be registrable in this office must not only possess artistic merit, but must be descriptive of the article for which it is used.

The alleged label in this case is said by the applicant to be used for music boxes; but the label itself does not indicate this. It is merely an arbitrary, ornamental design having the word 'Regina' thereon, and might very appropriately be used as a trademark for various articles."

Concerning this ruling of the Commissioner of Patents, the Court of Appeals said:

"We are not prepared to say that the statute imposing the duty in this case requires the performance of a simple, ministerial act, and is so plain in its terms as to admit of no room for construction. The Commissioner was called upon to decide whether the thing presented for registration was or was not a label as defined by the statute.

The foregoing extract from his opinion clearly shows that the duty of interpretation was not raised as an excuse for his action. As declared in the latest expression of the Supreme Court of the United States: 'Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction.' United States ex rel. Riverside Oil Company v. Hitchcock, 190 U. S. 316, 47 L. Ed. 1074, 23 S. Ct. 698."

Just as the Commissioner of Patents in the Regina Music Box Company case had the discretion to decide whether the thing presented

for registration was or was not a label as defined by the statute, so the Register of Copyrights in the instant case has discretion to decide whether the work for which registration is sought is a book or an aggregation of contributions to newspapers and whether the deposits required by the statute have been made. He decided both these propositions adversely to the plaintiff. Therefore, it would seem that both the Commissioner of Patents in the Rogina case and the Register of Copyrights in this case were put in the position of having to decide what the thing was which was offered for registration. It must inevitably follow, then, that, if the Commissioner of Patents' decision in such a matter was not subject to judicial review, the decision of the Register of Copyrights in an analogous situation also was not subject to be overturned by the courts.

The immunity of the Commissioner of Patents to court order in the matter of registration of labels was reiterated by the Court of Appeals in United States ex rel. Lincoln Highway Association v. Ewing, supra. In that case the petitioner asked the court for a writ of mandamus directing the Commissioner of Patents to register a label. The Commissioner had refused registration on the ground that a highway is not an article of manufacture. The writ was sought on the ground that this ruling by the Commissioner was a clear abuse of discretion. The court said:

"The contention of the relator is, not that the Commissioner was without jurisdiction to act, or that he refused to act, or that the statute peremptorily required him to act in a certain manner, but that he erred in his decision. We

are therefore called upon to substitute the writ of mandamus for a writ of error. This cannot be done. It may well be that the Commissioner erred in his opinion, but we are powerless in this proceeding to review his decision. The mere fact that he may have erred, will not justify the issuance of the writ. Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. *United States ex rel. Riverside Oil Company v. Hitchcock*, 90 U. S. 316, 47 L. Ed. 1047, 23 S. Ct. 698."

It would appear, by analogy that this court is powerless to review the decision of the Register of Copyrights or to compel him to make a different one, since to do so would require the Court to act as an appellate tribunal for the Copyright Office and would, in effect, do what the Court of Appeals in the Lincoln Highway case held could not be done - "substitute the writ of mandamus for a writ of error."

Section 53 of the Copyright Act, supra, authorizes the Register of Copyrights, subject only to the approval of the Librarian of Congress, to make rules and regulations for registration of claims of copyright. To do this, it is obviously necessary that he interpret and construe the statute and, in his administrative discretion, provide a reasonable machinery for effecting the ends prescribed by the statute. Pursuant to Section 53, the Register of Copyrights promulgated rules and regulations thirty years ago and they have been in effect, with slight modifications, since. The following excerpts from the rules will demonstrate that the Register therein interprets the Act, giving his understanding of terms or phrases con-

tained in the Act:

"(2) The proprietor of a work. The word 'proprietor' is here used to indicate a person who derives his title to the work from the author. If the author of the work should be a person who could not himself claim the benefit of the copyright act, the proprietor can not claim it." (p. 6)

(a) Books.—This term includes 'composite and cyclopaedic works, directories, gazetteers, and other compilations,' and, generally, all printed literary works (except dramatic compositions), whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term 'book' as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc., single poems, and the words of a song when printed and published without music; descriptions of motion pictures or spectacles; catalogues; circulars or folders containing information in the form of reading matter, and literary contributions to periodicals or newspapers.

5. The term 'book' can not be applied to—
'Blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum books, blank diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness.'

8. (d) Dramatic and dramatico-musical compositions, such as dramas, comedies, operas, operettas, and similar works. The designation 'dramatic composition' does not include the following: Dances, motion-picture shows; stage settings or mechanical devices by which dramatic effects are produced, or 'stage business'; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; scenarios for, or descriptions of motion pictures or of settings for the production of motion pictures. (These, however,

when printed and published, may be registrable as 'books').

10. (e) Musical compositions, including vocal and instrumental compositions, with or without words and separately published songs from operas and operettas, when not intended to be acted.

The words of a song printed alone should be registered as a 'book,' not as a 'musical composition.'

'Adaptations' and 'arrangements' may be registered as 'new works' under the provisions of section 6. Mere transpositions into (different keys, 'editing,' 'fingering,' or 'phrasing,') are not provided for in the copyright act. (p. 8)

12. (g) Works of art and models or designs for works of art.—This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration. (p. 8, 9)

13. (h) Reproductions of works of art.—This term refers to such reproductions (engravings, woodcuts, etchings, casts, etc.) as contain in themselves an artistic element distinct from that of the original work of art which has been reproduced. (p. 9)

15. (i) Photographs.—This term covers all photographic prints, but not half tones or other photo-engravings." (p. 9)

* (not contained in 1917 edition)

18. (m) Motion pictures other than photo-plays.

Postal cards can not be copyrighted as such. The pictures thereon may be registered as 'prints or pictorial illustrations' or as 'photographs.' Text matter on a postal card may be of such a character that it may be registered as a 'book.'

Trade-marks can not be registered in the Copyright Office. Application should be made to the Commissioner of Patents.

Labels and prints for articles of manufacture are required by the Act of June 18, 1874, to be registered for copyright in the Patent Office. The Copyright Office will register a claim of copyright in a pictorial drawing to protect such drawing; but if it is used for a label or print, the label or print should be registered at the Patent Office.

39. If special registration is requested for any contribution to a periodical, one complete copy of the number of the periodical in which the contribution appears should be deposited promptly after publication.

The entire copy should be sent; sending a mere clipping or page containing the contribution does not comply with the statute.

The date of publication of a periodical is not necessarily the date stated on the title-page. The application should state the day on which the issue is 'first placed on sale, sold, or publicly distributed,' which may be earlier or later than the date printed on the title-page."

The Attorney General has never expressed himself specifically with respect to the existence of discretion in the Register to determine, for the purposes of registration, what constitutes a book, but has done so with respect to works of art. 28 Op. Atty. Gen. 561, where it was stated:

"The phrase appears to be a new one in the copyright statutes, and experts would doubtless often differ as to its application; and the Register of Copyrights must,

therefore, when application for registration is made, determine for himself the question whether the work presented is one of art, but in so doing he cannot, of course, act arbitrarily and without good reason."

The above quoted opinion was referred to and approved in 30 Op. Atty. Gen. 426, where the Attorney General said:

"The question whether the four specimen prints transmitted by you are 'works of art' within the meaning of the statute as above construed, is, as has been stated, principally a question of fact, the solution of which involves the exercise of artistic judgment and discretion, and which should be determined, therefore, by the Copyright Office, rather than by the Attorney General."

Administrative interpretation of the term "book" by the Register of Copyrights was, by direct implication, recognized as an appropriate exercise of the Register's functions, and his views appeared to have been relied upon by the 7th Circuit Court of Appeals in the case of Edwards & Deutsch Lithographing Company v. Boorman, 15 Fed. (2) 35, where the court said:

"Copyright bulletin No. 15, defining what may be copyrighted under the term 'book', says:

'The term book as used in the law includes tabulated forms of information, frequently called charts, tables of figures showing the results of mathematical computation, such as logarithmic tables, interest, cost, and wage tables.'

By administrative construction appellant's publication is a book".

The 3rd Circuit Court of Appeals, in Witmark & Sons v. Standard Music Roll Company, 221 Fed. 376, 380, also accepted the administrative finding of the Register of Copyrights as to what constituted a book, stating:

and Section 10 provides:

***the rule has provided that, if only the words of a song were desired to be protected, the application should be made out for a 'book'; whereas, if protection was desired for both words and music, the application had to be made for a 'musical composition.' The Copyright Office in 1905, in further interpretation of the statute enumerating the classes of articles which became subjects of copyright protection, informed persons generally that, 'if the words only of a song are desired to be protected, the designation book should be used.' Under these rules a copyrighted 'musical composition' covered words and music; while if the applicant intended to copyright only the words of a song, he must have designated his work under the classification of a 'book', which has been construed to be a literary composition.

***From these views it follows that what might have been copyrighted as a literary production under the classification of a book cannot be said to be a reproduction of a musical composition when distributed without staff notation."

The reason why the Register must determine whether the material submitted for registration is a book or is an aggregation of contributions to periodicals is that the statute imposes upon him the positive duty to register a claim of copyright only when the provisions of the statute, including the deposit of copy, have been complied with.

Section 9 of the Copyright Act provides as follows:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under Section 21 of this title".

40- deposit of "one complete copy of the number of the periodical in which the contribution appears."

And Section 10 provides:

"Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificate provided for in Section 55 of this title."

In interpreting Section 10 the committee which reported the bill which became the present Act said as follows in Report No. 2222 to accompany H.R. 28192:

"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration."

In other words, prior to registration in each case, the Register must, to the extent that the equipment at the Copyright Office permits him to do so, determine whether or not the provisions of the Copyright Act have been complied with by the applicant. To this end, he must determine whether the applicant is a person entitled to secure copyright, as indicated in Sections 8 and 23; whether the work itself is copyrightable under Sections 4, 7 and 15; whether, if a published work, copyright has been secured by publication with adequate copyright notice as provided in Sections 12, 18 and 19, whether the deposit of copies required by Section 12 - stated in Section 10 to be a condition precedent to registration - has been made, and whether the fees required by Section 61 have been paid.

Pursuant to his duty of requiring proper deposits, the Register has promulgated certain rules as to deposits. See generally Rules 20, 21 and 22 in the case of unpublished works; Rule 24 in the case of published works, and Rule 39 in the case of contributions to newspapers, which last rule requires the deposit of "one complete copy of the number of the periodical in which the contribution appears."

While a contribution is from one aspect a book, under the Copyright Act it is distinctly not a book for the purpose of deposit and registration under Section 12.

Except for Section 23, which differentiates between a composite work, and a contribution to such work, Section 12 is the only section of the Act which maintains this distinction.

In order to tell what kind and number of copy or copies to require for registration, the Register must decide whether the material for which copyright is claimed is a book, or a contribution, or an aggregation of contributions to periodicals. Section 10 forbids the Register to effect registration until "the provisions of this act, including the deposit of copies, are complied with". To argue that he is powerless to interpret the Act and to sift and to determine facts in reaching such a conclusion is to contend that he is powerless to perform his duty.

In one of the Opinions of the Attorney General referred to above (30 Op. Atty. Gen. 426), the German Ambassador contended - as does the plaintiff here - that the Register was without authority even to inquire into the facts surrounding an application for registration. On the question of the Register's power to determine the validity of the registration sought, the Attorney General said:

"The suggestion that the determination of the validity of the registration should be left to the courts, and the necessary inference involved that the duty of the Register is purely automatic, and consists wholly (with the single exception of books) in determining whether the subject presented is a lithographic print and therefore within the general class of articles which may be copyrighted, cannot be reconciled with the power vested in the Register to issue rules and regulations under which he will permit registration under

the law. That section of the law plainly indicates that he has at least some measure of discretion in the administration of the Act. Manifestly, in the exercise of that discretion he may make such investigation and require such showing of compliance with the law as may be necessary to enable him to determine whether the prerequisites imposed have been met.

If the contention be correct that the Register is vested with no discretionary powers of investigation, and has no authority to demand a satisfactory showing of compliance with the plain conditions prescribed by law as prerequisites to the issuance of copyrights, that officer is reduced to the role of a mere automaton who, upon receiving an application for copyright of a lithograph, must register and issue a certificate therefor which shall thereafter be accepted in the courts as prima facie evidence of the facts stated therein, even though the legal prerequisites to the valid registration of the copyright may have been wholly ignored. Clearly such a construction would serve to defeat the purpose and intent of the Act."

Not only must the Register determine whether the deposit required by the Act has been made but he also must require that the fees required by the Act are tendered. Section 61 provides as follows with respect to fees due for the registration of published works:

"The Register of Copyrights shall receive, and the persons to whom the services designated are rendered shall pay the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, \$2, which sum is to include a certificate of registration under seal."

The \$2 fee required by Section 61 obviously is for each published work subject to copyright and not for an aggregation of many published works subject to copyright. On its face, each of the five volumes of King Features Illustrated Weekly and the volume entitled King Features Weekly announce to the Copyright Office and to the public that King Features claims a separate copyright to each of the contributions aggregated in these six bindings. This is done by the printed copyright notice on each of the contributions.

Under Section 50 of the Act "the Register of Copyrights shall give bond to the United States in the sum of twenty thousand dollars *** for the faithful discharge of his duties." If the Register has no power to interpret the pertinent sections of the Act to determine what fees the Act requires from applicants for registration of claims of copyright, but must accept the applicant's version of the amount of the fees due the Government, he might as well admit an existing liability under his bond from the date he takes office.

It is not only his duty under Section 10, but he is obligated under his bond to investigate with the greatest care any device the result of which, if acceded to by the Copyright Office, would on its face lead to the nonreceipt by the Government of copyright registration fees.

The Register has examined this situation with the utmost care and has concluded that the deposit of the five volumes of King Features Illustrated Weekly and one volume of King Features Weekly as six composite works, is merely an attempt to evade the payment of fees under conditions not contemplated by the Act. An examination of this material shows that it is composed of articles written for the newspapers with many of which articles every reader of the newspapers is familiar, and that on the date that these so-called composite works were alleged to have been published many of these articles had already been published in the daily press, and the publication of the remainder within the next few days was contemplated; that by October 10, 1938, the date on which the Copyright Office received these so-called composite works many more of these separate contributions had already been published in the daily press, and with respect to each one of them King Features claims a separate and distinct copyright.

There are 423 separate contributions. To all of these, with the exception of four, King Features attaches a separate copyright notice, the notice having apparently been left off by inadvertence with respect to the four in question.

Assuming, for the sake of argument only, that these six "volumes" were really published on October 6 and really constituted composite works, investigation shows that 22 of the contributions in King Features Weekly had already been published by the 6th of October and that by the date of alleged publication of King Features Weekly as an alleged composite work King Features Syndicate, which claims to be the copyright owner of these 22 articles, was then and there under the obligation of filing with the Copyright Office copies of the newspapers containing these 22 publications together with a fee of \$44.

That this material did not, however, constitute a composite work has already been established. The next question that arises, then, is as to what action the Register should take with respect thereto when it was actually received in the Copyright Office. It was received in the Copyright Office on October 10. Recognizing the material for what it was—proof sheets or newspaper copy of contributions to the newspapers—it was not only necessary but pertinent for the Register to inquire as to what newspaper publications had already taken place with respect to this material by October 10, setting aside those 22 newspaper publications which had occurred prior to the date of the alleged publication of the alleged composite work by King Features. Examination shows that aside from these 22 publications, the newspapers had already published by October 10, 92 of the contributions to which separate copyright was claimed by King Features, 17 of these appearing in King Features Weekly, and 75 in King Features

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represent That this material did not, however, constitute a composite work has already been established. The next question that arises, then, is as to what action the Register should take with respect thereto when it was actually received in the Copyright Office. It was received in the Copyright Office on October 10. Recognizing the material for what it was--proof sheets or newspaper copy of contributions to the newspapers--it was not only necessary but pertinent for the Register to inquire as to what newspaper publications had already taken place with respect to this material by October 10, setting aside those 22 newspaper publications which had occurred prior to the date of the alleged publication of the alleged composite work by King Features. Examination shows that aside from these 22 publications, the newspapers had already published by October 10, 92 of the contributions to which separate copyright was claimed by King Features, 17 of these appearing in King Features Weekly, and 75 in King Features

of the Postmaster General in classifying mail matter. If the court
Illustrated Weekly. In view of the specific provision of Section 12
in the Twentieth Century case was correct in stating that the function
that the deposits made in the case of contributions to newspapers must
be the issues of the newspapers themselves, and in view of the demon-
stration by King Features on the face of the record that these were in-
tended to be 92 separate works each one of which was the subject of
copyright and called for the payment of \$184 by way of copyright fees,
of Appeals and of the Supreme Court in other Post Office cases. Indeed,
the Register of Copyrights certainly could not register them and 309
other such separate works for the fee of \$12.

Finally, with respect to the remaining 309 contributions in
each one of which King Features claims a separate copyright and which
appear to have been published in the newspapers subsequent to the date
of the receipt of the six "volumes" by the Register on October 10,
1938, the Register, being convinced that these "volumes" did not
represent books or composite works but constituted mere aggregations
of proof sheets and newspaper copy gotten together for the sole pur-
pose of attempting to evade the payment of the fees required under
the Copyright Act, and being convinced that their true publication, in
the sense in which publication is used in the Act, took place in the
newspapers following the purported publication of the purported com-
posite work, refused to register on the ground that in the matter of
the payment of fees the applicant had not complied with the provisions
of the Act in that he was attempting to force the Government to accept
fees of \$12 instead of total fees amounting to \$846.

In Twentieth Century-Fox Film Corporation v. Bouve,
supra, the court relied upon Payne v. National Railway Publishing
Company, 20 App. D.C. 581, and likened the function of the Register
of Copyrights in passing upon applications for registration to that

of the Postmaster General in classifying mail matter. If the court in the Twentieth Century case was correct in stating that the function of the Register of Copyrights was similar to that of the Postmaster General, his conclusion that the Railway Publishing Company case controlled the Twentieth Century case is, it is respectfully submitted, proven erroneous by subsequent decisions of the United States Court of Appeals and of the Supreme Court in other Post Office cases. Indeed, in the case of Payne v. Houghton, supra, Mr. Justice Shepard distinguished the National Railway Publishing Company case in such fashion as to make it clear that it was without application to the Twentieth Century case or to the instant case. There, Justice Shepard said:

"The case at bar is distinguishable from that of Payne v. United States ex rel National Railway Publishing Company, 20 App. D.C. 581, inasmuch as there is not only some difference in the facts relating to the respective publications, but also, and particularly, for the reason that the action of the Postmaster General in that case was based upon a regulation of his Department, in excess of his authority, because it made a substantial addition to the requirements of the statute.

Upon the practical admission, as apprehended by the court in that case, that the plaintiff had complied with the requirements of the statute itself, and was denied the admission of its publication to the mails as matter of the second class, it was held that the Postmaster General owed it the performance of a simple duty plainly imposed by the Act of Congress that was enforceable through the writ of mandamus."

Therefore, it will be seen that, in interpreting its own decision in the Railway Publishing Company case, the Court of Appeals did not consider it as an authority for the proposition that a finding of fact by the Postmaster General with respect to matters coming within his jurisdiction was reviewable by the court irrespective of whether or not it was arbitrary. It would seem that the very language used by the court in the Railway Publishing Company case is in accord

- 47 -

with the interpretation given in Payne v. Houghton for in the earlier case the court said:

"The citizen who desires to have his publication carried in the mails of the United States as second-class matter and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of mandamus, if the Postmaster General arbitrarily or without valid legal reason refuses to receive and transmit such publication."

Besides distinguishing Payne v. National Railway Publishing Company, supra, the case of Payne v. Houghton and its companion case of Payne v. Bates & Guild Company, establish that the classification of mail matter, to which the court in the Twentieth Century-Fox case likened the determination which must be made by the Register of Copyrights, is an act requiring the exercise of judgment and discretion. Relevant excerpts from the Houghton and the Bates & Guild Company cases have been quoted heretofore in this brief. Therefore it would seem that the refusal of the Register in the instant case to accept the material before the court was a discretionary matter. That the courts will not review a decision of an administrative officer involving an exercise of judgment and discretion is a principle of law too well recognized to require citation and authorities.

The plaintiff contends the action of the Register was arbitrary. Was it arbitrary for him to require King Features pay the fees required of other registrants? By attempting to obtain registration of 423 contributions to periodicals for \$12, King Features would pay into the United States Treasury approximately three cents for each registration, whereas other registrants of contributions to periodicals -- some 438,000 of them from 1916 through 1939 -- have to pay \$2 for each registration. To put an end to such discrimination

scarcely can be termed arbitrary.

In conclusion, it is submitted that a court of equity should not give relief in this case, since the plaintiff has not done equity. In effect, the plaintiff is attempting, by subterfuge to evade the plain intendment of the law for the obvious purpose of saving the copyright fees that the law says he should pay.

Respectfully submitted,

EDWARD M. CURRAN
United States Attorney.

WILLIAM S. TARVER
Assistant United States Attorney.

H. L. GODFREY
Attorney, Department of Justice.

Copy for Mr. Tarver.

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WASHINGTON, D. C.

TELEPHONE
NATIONAL 1442
NATIONAL 1442

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

Holding a Civil Court.

----- x	
KING FEATURES SYNDICATE, INC.,	:
a corporation,	:
	:
Plaintiff,	:
	:
v.	: Civil Action No. 540.
	:
CLEMENT L. BOUVE,	:
Register of Copyrights,	:
Library of Congress,	:
	:
Defendant.	:
	:
----- x	

Washington, D. C.,

Thursday, October 31, 1940.

The trial of the above-entitled cause was resumed before Associate Justice Daniel W. O'Donoghue in Civil Division No. 8 at 10 o'clock a. m.

APPEARANCES:

There was no appearance in behalf of the plaintiff.

In behalf of the defendant:

William S. Tarver,
Assistant United States Attorney.

P R O C E E D I N G S

OPINION OF THE COURT

The Court (O'Donoghue, J.). In the case of King Features Syndicate vs. Bouve, Civil Action No. 540, the Court finds the facts to be substantially as contended for by the plaintiff, and

the Court also finds the law to be as contended for by the plaintiff.

Accordingly, the attorney for the plaintiff will prepare findings of fact, conclusions of law, and a draft of a final determination in the case.

Counsel for both sides will get their exhibits, respectively, from the Clerk of the Court.

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P R O C E E D I N G S

Mr. Tarver. I am passing up to your Honor a brief which I have served on the other side.

Mr. Blum. And here, your Honor, is a pamphlet containing the copyright statute which may be handy to your Honor in following the arguments.

The Court. You may proceed, Mr. Blum.

(Mr. Blum argued the case to the Court on behalf of the plaintiff.)

(Mr. Tarver argued the case to the Court on behalf of the defendant.)

(Mr. Wasserstrom and Mr. Blum made the closing argument on behalf of the plaintiff.)

The Court. I will take the case under advisement and I will read the pleadings and depositions and go over the exhibits and the briefs filed by both sides. I will start on it right away, that is, tomorrow, and keep working on it until I arrive at my decision. I will notify counsel through the clerk, and I will render my decision orally from the bench.

(Whereupon, at 1:25 o'clock p.m., the trial of the above-entitled cause was concluded.)

Address Reply to
"The Attorney General"
and refer to
Initials and Number.

DEPARTMENT OF JUSTICE,
Washington

G

C
O
P
Y

November 3, 1906

M R

92503

Sir:

I have the honor to reply to your request for an expression of opinion concerning a matter which has arisen in the administration of the Copyright Office in connection with the application for registration of the title of a book entitled "Growth, A novel by Graham Travers."

It appears that the author of the work is English, and that it has been published in London. Accompanying the application for copyright were two copies of very indifferent proof sheets stitched together with a cover title, but no regular title page. The type was set up in this country and only three copies of proof sheets were printed.

The Librarian of Congress desires to know whether the Copyright Office is authorized to register the title of the book and to accept the two sets of proof sheets as a full compliance with the law.

I incline to think that proof sheets of the character described do not constitute "copies of such copyright book," within the contemplation of the statute, and recommend that they be rejected. If the parties presenting them have the rights asserted they may seek a remedy through the courts.

The President, p. 2.

I return herewith the communication of the Librarian of Congress with its enclosure - a memorandum from the Register of Copyrights.

Very respectfully,

(Signed) M. D. Purdy,

Acting Attorney General.

To the President.

Enclosures - 11541.

CONTRIBUTIONS

Under the old law there was no express provision for securing a separate copyright in a contribution to a periodical. Generally speaking, it was only as a part of the issue of the periodical that the work was protected. There was considerable uncertainty as to what the rights of the author were in the absence of a written contract defining them. Some publishers claimed all; others claimed only the serial rights.

At the first session of the Conference on copyright preceding the present law, it was proposed to give the publisher the exclusive right only for the first three years of the term, whereupon the balance of the term was automatically to revert to the authors of the articles. This did not prove satisfactory to the publishers and the idea was abandoned. In lieu of it, the first draft of the new measure contained the following provisions:

"Sec. 25. In the case of a contribution to any periodical one copy of the issue or issues of the newspaper or magazine containing such contribution shall be deposited not later than ten days after the date of the issue inscribed thereon."

"Sec. 37. In the case of newspapers, magazines and other periodicals ... it shall be deemed sufficient if the notice of copyright is printed on the title page... Provided, however, That the author of any contribution to a periodical may, at his option, deposit his contribution for the purpose of registering his claim of copyright therein, and print the statutory notice of copyright under the title of his article."

The intention was to break the alleged strangle-hold of the publisher by enabling the author to secure a separate copyright for his contribution.

These two provisions were ultimately combined to form the clause we have here in Section 12 of the present Act:

"..or if such work be a contribution to a periodical for which contribution special registration is requested, one copy of the issue or issues containing such contribution.."

Observe that the phrase, "for which special registration is requested," is used instead of "at his option" in the earlier draft. This because the author must have exercised his option in order to be in a position to request special registration in contrast to the general registration of the issue as a whole on the part of the publisher.

The words, "or if such work," here refer back to "the work" in the opening clause of Section 12: "That after copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this Act, there shall be promptly deposited, etc."

Hence the author of a contribution published with separate notice is under the same legal obligation to deposit copy and register his claim as is the proprietor of the periodical. Further down in the Section it is provided that the deposit is "to be accompanied in each case by a claim of copyright." Until the author makes the necessary deposit with claim of copyright (i. e., application for registration of a claim of copyright), he can take no action or proceeding in case his contribution is infringed; and unless he does so he is subject to the operation of the next section which empowers the Register of Copyrights to demand the deposit "at any time after the publication of the work," and in case of failure to obey such demand within three months, the delinquent is liable to a fine of \$100, etc., and the copyright in his article becomes void.

The legal effect of this clause relating to contributions would be precisely the same if the phrase, "for which contribution special registration is requested," had been omitted. It is the presence of the notice in connection with the contribution that is the controlling factor which takes the matter of deposit out of the discretion of the author and makes it obligatory. If the author had ~~not~~ published his article with^{out} notice, he would have no copyright upon which to base a request for registration, and in the absence of the notice, such a request would be rejected by the Copyright Office.

In the case of In Old Chicago the Register has not made formal demand under section 13 but has declined to make registration upon a deposit of what seems clearly to bear all the earmarks of proof copies intended to reach the public in the form of contributions to newspapers, and which in fact ~~did~~ actually reach the public in the form of contributions to the extent of some ten instalments, at the very time the application for registration of the alleged book was received on January 13, 1938; and by the time this application was reached for consideration on the merits, the entire story had appeared serially in the Los Angeles Daily News; and later on in various newspapers throughout the country in places where the motion picture based upon the story was exhibited.

As a matter of fact, Philip Wiley was engaged by the petitioner to write a special version of the story not for the purpose of publication of a book (the 20th Century Co. is exclusively a motion picture concern, and not a publisher of books), but for the purpose of ^{publicizing, selling and} advertising the picture in the various localities where it was to be exhibited; in other words, for the purpose of arousing public interest and thereby swelling the box office receipts of the motion picture theatres. The letter from petitioner's general counsel accompanying the application himself referred to the material as a "serialization". This characterization was so obviously confirmed by an examination of the copies deposited that the Register had no alternative but to request the applicant to treat it as such and make deposit of "one copy of the issue or issue (of the periodical) containing such contribution", as provided in section 12. You may ask, could not the Register have exercised his discretion by accepting the copies as deposited? I think the answer is that this would not have been exercising discretion but indiscretion; for he could not shut his eyes to the nature of the deposit without at the same time shutting his eyes to several provisions of the Act, such as Section 10 which in effect only authorizes him to issue the certificate of registration after the applicant has performed the condition precedent of "complying with the provisions of this Act"; section 12 which calls for deposit of the "best edition", which in turn in the case of a contribution Congress has itself interpreted to mean "one copy of the issue or issues containing such contribution"; section 59 which provides for the disposition of copyright deposits and plainly reveals that the purpose of the deposit is primarily to enrich the Library of Congress, and therefore calls for copies in the form in which it is intended that the public shall enjoy the work; and Section 50 which requires the Register to give bond to the U.S. in the sum of \$20,000 for the faithful performance of his duties. This means all his duties, one of which is to see to it that "the persons to whom the services designated are rendered shall pay... for the registration of any work subject to copyright, deposited under the provisions of this Act, \$2, which sum is to include a certificate of registration under seal".

This applies separately to King Features and

Each instalment of a serialization is itself a contribution to that issue of the periodical and is a work subject to copyright, and if it carries a separate notice of copyright requires a separate deposit and application and the payment of a fee of \$2. In the present case the story was published in twenty instalments, so that there ~~was~~ brought into existence a plurality of copyrights, each beginning on a different date and each carrying the obligation of deposit, registration and payment of fee.

*

MEMORANDUM

Re: Distinction between Registrable and Non-registrable Proof Material.

1. Registrable Proof Material

This serves the primary purpose of a catalogue. Includes books of illustrations, accompanied by more or less text, or none at all, distributed for use as regular catalogues are used, namely, to enable the customer to order from the producer such illustrations as he may wish to reproduce as advertisements in his local newspapers or otherwise (such as handbills or in the customer's own catalogue distributed to his own patrons). These are supplied in the form of cuts or mats, with the understanding that he may change the text at will to meet his own requirements.

The material thus distributed in the form of a catalogue does not therefore represent merely an intermediate process in the manufacture of the book, but is the final and only form in which the producer publishes his material. His clients are his public.

The supply of cuts or mats is governed by contract running for a certain period. Sometimes the separate cuts carry a separate copyright notice, but often they do not. The book of illustrations, however, always carries the regular notice on the title page, and sometimes individual pages of various cuts carry one general notice.

The producer makes no contact or contract with the newspapers. It is the customer who does that and supplies the newspaper with the mats. The newspapers could not independently procure copies of the books for the purpose of publication, for the obvious reason that they are not designed for advertising at large but only for a particular locality and for a particular customer.

This type of material while called proof, is not printed on proof paper but on a good quality of glazed paper.

Unless the producer secured copyright for his books of illustrations, he would be unable to carry out his contract to give the customer the exclusive right of user within the designated territory.

2. Non-registrable Proof Material

Here a different story presents itself. It is in no sense a catalogue of illustrations. The producer deals directly with the newspapers, and his output is of a totally different character. It is either in literary form or in the form of cartoons, designed in both cases exclusively for newspaper publication in the first instance and in a certain sequence, and until so published has not served its primary purpose. The situation is analogous to that of an individual

author who submits an article or series of articles to a newspaper for acceptance or rejection. Unless accepted and published in the newspaper, there is no publication in the statutory sense.

Such material is clearly in an intermediate process between production and publication. As presented to the Copyright Office, the proof material consists of an aggregation of miscellaneous items, each bearing a separate notice of copyright and a "release" date; or a serialization in the form of the several chapters of a story, each chapter printed in columns, bearing the same heading, with a resumé of what has gone before, with "to be continued" and separate copyright notice at the end. As a matter of fact, the newspaper publication has already begun or even in some cases been completed, before the deposit of the so-called book has been received in the Copyright Office. The situation as disclosed by examination of the copies leads to the conclusion, apart from admission by the representatives of the producers in conference, that the primary purpose of presenting such material in aggregate proof form and calling it a book, is to save paying copyright fees which the law provides shall be paid. And not only that, but the law also specifies what shall be deposited in the case of material designed primarily for newspaper publication. It is the "best edition then published," and in the case of contributions the law itself defines the "best edition" as consisting of a complete copy of the newspaper containing the contribution. In the original Hearings, the purpose of this requirement was explained as intended to "obviate the deposit of proof sheets," which is the very thing the petitioners have done.

MEMORANDUM

In re: Depositions in 20th Century-Fox Films Corp. v. Bouvé as Register and then bring it out in book of Copyrights. But even assuming such an unusual case as publication of the book and subsequent registration in serial. This proceeding was instituted by the plaintiff for the sole purpose of establishing by the testimony of witnesses the alleged claim of publication of the story, "In Old Chicago" in the form of an alleged book on December 30, 1937. The first testimony with a record of the preceding matters—

The plaintiff rests its claim of publication upon:

(1) The delivery to Brentano's in New York City of ten (10) copies of what is referred to as the "Red Book" (designated as plaintiff's Exhibit No. 1), this being the material presented to the Copyright Office for registration on January 13, 1938.

Comment: The receiving clerk at Brentano's testified that when this material arrived it was of such an "unusual" character with respect to its physical make-up, that he did not know what to do with it, and asked the manager for instructions, who told him to "put them in stock."

(2) Secondly, upon the delivery of five (5) copies of said material to one Richker's store on December 30, 1937.

Comment: The plaintiff's witness to this transaction, George Bittar, a minor employee in the service of plaintiff, was somewhat hazy about what passed between him and Richker. Asked whether Richker paid anything for the copies, he answered, "No." Asked whether any sale had taken place, he answered in substance that he had "bought back" one copy for the company (the plaintiff); that he paid no cash for it but had it charged to the company. he had no knowledge of any other sale; that so far as he knows, Richker still has the remaining four copies.

Bittar's immediate boss was Earl W. Wingart, plaintiff's publicity manager. Wingart, when handed a copy of the "Red Book" and asked to identify it, said, "This is a copy of the book 'In Old Chicago' we had published for serialization purposes."

Asked by plaintiff's attorney to explain, he stated, "The reason I said that was because this book was published for copyright purposes in connection with the serialization of 'In Old Chicago', that the prime thing that I was interested in was the distribution to newspapers of the serialization of this story. This book was the book which we had published for copyright purposes prior to our serialization of the story to newspapers." (Page 11)

Comment: Can there be one kind of publication "for copyright purposes" and another kind for the purpose of introducing the work to the reading public? Assuming without admitting that this position is tenable, it seems clear that the purposes of the Library of Congress as well as the plain terms of the Copyright Act require the deposit of copies offered for general consumption

The universal practice nowadays is to publish a story in serial form and then bring it out in book form; not vice versa. But even assuming such an unusual case as publication of the book and subsequent republication in serial form, the deposit of copies of the book in proof sheets, or having the appearance of proof sheets, printed on one side, each sheet be ring a separate chapter and carrying a separate copyright notice, and each chapter after the first beginning with a resumé of the preceding chapters--thus plainly showing that they are primarily intended to reach the public not in such form but in the form of contributions to newspapers--is not such a deposit as the copyright law plainly calls for and as the purposes of the Library of Congress demand. Otherwise, if the Copyright Office were to accept such copies as here involved, it would be obliged to accept copies in similar form in the case of any other book, even though it be one of the "best sellers" like "Gone With the Wind" or "The Citadel." As a matter of historical fact, it was to prevent that very thing that the provision was inserted in Section 12 of the present Act with respect to contributions.

In the stenographic report of the proceedings of the second session of the conference on copyright held at New York Nov. 1, 4, 1905, eventuating in the present copyright Act, the then Register of Copyrights, Mr. Salberg, explained the provision for deposit of the issue or issues of the periodical in the case of a contribution, thus: "That is to obviate proof sheets being sent in." (p. 461)

May 26, 1938.

MEMORANDUM re "IN OLD CHICAGO"

For various reasons it has been thought proper to ask leave for the amendment of the answer to the petition setting out that the "In Old Chicago" material, as presented for registration, does not, for the purposes of Section 12 of the Act, constitute a book; but, on the contrary, does for such purposes constitute a contribution to a newspaper.

In this connection attention may be called to the fact that in the course of correspondence with the petitioner it was pointed out that the nature of material fundamentally intended to serve as a contribution to a newspaper could not be changed by the simple process of sewing proof sheets of this material together, binding it, and calling this accumulation of prospective newspaper contributions a book. The principle announced and the reasons for it find definite authority in the case of Smith v. Hitchcock (226 U. S. 53, 58, 59 and 60.)

The point involved in that case was the right of Postmaster General Hitchcock to characterize, for the purposes of the Postal Laws, certain material as a book, which had for the preceding fifteen years been characterized by his predecessors as periodical material. Under those regulations periodicals came into what was known as a second class and books into a third class. The decision of the court was that for the purposes of the administration of the Postal Laws the Postmaster General had the right to determine what material constituted a periodical and what a book.

Referring to prior cases, Bates & Guild Co. v. Payne (194 U.S. 106), American School of Magnetic Healing v. McAnnulty (187 U. S. 94), Public Clearing House v. Coyne (194 U. S. 497), Houghton v. Payne (194 U. S. 88) and Smith v. Payne (194 U. S. 104), Justice Holmes, who rendered the opinion of the court, said:

"It is established by the same authorities, that books, that are expressly embraced in mail matter of the third class by section 17 and so made liable to a higher rate of postage, cannot be removed from that class and brought into the second [periodicals] by the simple device of publishing them in a series at regular intervals of time." (pp. 58-59)

And again:

"The word book also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present section 17 [of the Postal Regulations]. As books are not

turned into periodicals by number and sequence, the magazines are not brought into the third class [books] by having a considerable number of pages stitched together."
(p. 59)

Herein, it seems to me, is found ample and conclusive authority for the proposition advanced by the Register of Copyrights as one of the grounds for refusing to accept registration of the material entitled "In Old Chicago" in the form in which application for the registration thereof was made. The material was, beyond any question, basically intended for publication as a contribution to a newspaper. The form in which it was printed was newspaper form. Ten days before the application for registration had been made, ten of the twenty chapters of the work had already been published in the Los Angeles Daily News.

Section 12 of the Act makes a clear distinction between books and contributions in connection with the nature of the deposits required in the case of each. The requirement for books is "two complete copies of the best edition thereof"; the deposit requirement for contributions is "a copy of the issue or issues in which such contribution appears."

All that the petitioner has done in this connection is to collect proofs of the material which he intends to really distribute to the public for the first time, stitch them together, put a paper cover on them, and call the result a book. While the point has not been specifically raised that the so-called first publication in this "book" form was purely colorable because it was thought this would merely inject an unnecessary feature into a case already somewhat complex, there is no doubt that such publication was, from the standpoint of the intent of the copyright law, a mere device. The law is so clear as to the particular form of the deposit required by Section 12 in the case of contributions to newspapers as to require no elucidation. Just as Justice Holmes observed that, for the purposes of the Postal Regulations, books cannot be transformed into periodicals "by the simple device of publishing them in a series at regular intervals of time," the Register contends that, for the purpose of the Copyright Act, and particularly for the purposes of its requirements as to the nature of deposits, contributions to a newspaper cannot lose their nature by the simple device of assembling them and calling the result a book.

Aside from the fact that it ^{is} ~~is~~ seen clear, upon general considerations, that the answer to the petition should be amended as above suggested, the above views of the Supreme Court, as announced in the Smith v. Hitchcock case, seem at once to make such an amendment all the more desirable and at the same time afford unassailable authority to sustain the thought conveyed by the amendment, as well as to point out the propriety of the Register's action in refusing registration on this ground in addition to others already suggested.

First carbon copy

(1) This material was published as stated in the petition and June 4, 1938.

It is stipulated between the parties that:

- (1) ~~The material entitled "In Old Chicago"~~ constitutes as printed the first step toward the production of a published edition of the writing in serial form as a contribution to a newspaper or other periodical publication. It consists of a collection of sheets made from type set for the production of the material in newspaper form.
- (2) The publication of the work in the form of a contribution to a newspaper began by publishing chapter I thereof in the Daily News, Los Angeles, California, on Monday, January 3, 1938, ten days before application for registration of the material was made to the Copyright Office on January 13, 1938. The first ten chapters thereof were already published as separate contributions to the above newspaper by January 13, 1938, the date of such application, and available for deposit. Each chapter thus published contained the copyright notice "Copyright 1937 by 20th Century-Fox Film Corporation."
- (3) The Daily News, Los Angeles, California, is a daily newspaper which has for many years past been published, sold, and publicly distributed on the publication date therein contained and is printed as required in Section 15 of the Copyright Act. The succeeding issues of the Los Angeles Daily News following January 13, 1938, to wit; January 14, 15, 17, 18, 19, 20, 21, 22, 24 and 25, 1938, carried the ten remaining chapters of "In Old Chicago," to each of which was affixed a separate copyright notice, and like the preceding ten issues of the newspaper aforesaid complied with all the requirements of the Copyright Act.
- (4) That under the practice of the Copyright Office had the petitioner on January 3, 1938, when the material entitled "In Old Chicago" was first published in the Los Angeles Daily News, or at any time prior to January 13, 1938, deposited the issues of the Los Angeles Daily News containing the first ten chapters of "In Old Chicago" with the Copyright Office, with an application for registration of claim of copyright to such material, registration would have been made and certificate of registration issued.
- (5) Under the ^{present} practice of the Copyright Office page proof material ^{is} not accepted for registration, and no provision for its acceptance is found in the Rules and Regulations of the Copyright Office, put into effect and approved by the Librarian of Congress as provided by Section 53 of the Copyright Act. ^{the material deposited}
- (6) That the facts set out in the preceding paragraph were well known to the petitioner at the time the application for the registration of the material entitled "In Old Chicago" was filed for registration in that on two preceding occasions application for registration of similar material identically printed and constructed, to wit: material entitled "Lloyds of

London" by Peter B. Kyne and "The Slave Ship" by Gouverneur Morris, was rejected by the Copyright Office for the same reasons that the material "In Old Chicago" was rejected for the purposes of registration, to wit: That the deposits submitted constituted page proof and that the issue or issues of the newspaper in which such contributions appeared were not filed in support of the application for registration.

Register of Copyrights

STIPULATION

It was to the interest of the petitioner to obtain simultaneous publication of the writing entitled "In Old Chicago" in Canada and the United States.

The construction of such material in bound form was accomplished in order to carry out this purpose on December 30 in Canada and the United States, because it would have been impracticable to publish the same in newspaper form in Canada simultaneously with such publication in the United States.

That it is the practice of the petitioner in connection with the exhibition of moving pictures displayed by it in a given city or place to procure the serial publication in a newspaper or newspapers of that city of the story represented by the picture at about the same time the picture is exhibited.

The picture "In Old Chicago" represented by the material in question was exhibited in Los Angeles, California, on the following dates: _____; and was published in various newspapers of the United States in serial form about the time when the picture was reproduced in the cities where such newspapers were published.

Register of Copyrights

Page Proof

17

There is one very definite point to be kept in mind in connection with this process of "publishing page proof." It is no argument in support of such a process as this to say that the Library will have to accept a first edition of a book gotten up in the very cheapest way in which books could be gotten up and yet maintain a likelihood of sale to the public as such. It is no argument to say that, with respect to "In Old Chicago," it might have been possible to have published the story in an edition which would have cost the publisher less money than "In Old Chicago" would have cost. For if the publishing of a dirt cheap edition were accomplished by a publisher with deliberate intention in order to avoid providing the Library of Congress with two splendid copies of the same material which he intended to get out later each costing \$25, say, it would be difficult to see how even getting out an edition of the cheapest would not run into more money than \$50 or perhaps a cost exceeding \$100 in the purely hypothetical case of two volumes of the same work gotten out in a deluxe edition at the cost of \$50 apiece. Of course, we are speaking of nothing practical in this example. But the suggestion is put forward in order to show how the argument that the Library might have to accept a cheap edition which might cost less money than the page proof edition of "In Old Chicago" is of no weight. It is conceivable that there might be a cheaper edition if the fact were that although published in the form of proof, no intention existed to follow up such first publication of such proof by its normal publication as a bound book or in a newspaper. In a word, the only reason why this novel idea of trying to force the Copyright Office to accept for the Library two pages of proof material such as exists in "In Old Chicago" is because that material is really intended to be published in a newspaper—because the construction of the proof copy is a necessary step which must be taken in contemplation of newspaper publication in any event. It is a cost incidental to newspaper publication and for that reason the publisher not only can afford to, but is obliged to, meet the expense thereof.

Page Proof

7

It is freely admitted that a book, in order to constitute a book for purposes of registration under the Copyright Act, need not be printed--that it may be in longhand, it may be in mimeographed form, or it may be in type-writing. If it is any of these forms and has been published with copyright notice, it is registrable as a book. But it is only registrable as such book because, although in such unusual form, the copies sent in constitute two complete copies of the best edition. In the construction of such books there is no such thing as page proof--there is no process by which the words constituting the writing appear in the normal process of bookmaking in a form different from that which is in truth and fact the completed edition.

The above types of books are exceptional cases--not the usual case of publications in the form of printed books or printed articles appearing in periodicals or newspapers.

In the case of such printed material "proof" is a feature recognised as essential to the physical completion of the book--it is a setting in printed form of the words written, but is of itself an incomplete process--the physical manifestation of an intermediate process in the production of the printed book.

result follow when the writing has already, ten days before registration, begun to be published as a newspaper contribution? Can the act of hind^{ing}/proof of material intended to be published and printed in book form or in the form of a contribution to a newspaper (1) change that which is in its essence incomplete to complete? (2) make it obligatory on the Register to accept page proof of writings, complete copies of the best edition of which Section 12 requires shall be deposited, (3) make it obligatory on the Register to accept page proof of contributions to newspapers when the act specifically requires copies of the newspapers?

These are the questions presented to the Register for solution in this case; and in deciding that were he to accept these deposits for registration, he would have to place an absurd construction upon the Act--which would defeat the purpose of deposits--i.e., the enrichment of the Library of Congress--he feels that he is acting entirely within his discretion in refusing to accept these deposits. The Register feels that the express terms and obvious purpose of the Act cannot be defeated by a transparent device.

Congress was well aware that other written matter than printed books was copyrightable and registrable. But it also knew that under Section 12 writing submitted in the form of printed books was registrable.

As to material not involving printed matter, the deposits required must be complete copies of the best edition. As to material involving printed matter, the deposits required must be complete copies of the best edition.

But it is a fact of which the court may take judicial notice that the proof sheets of printed matter, whether a "book" in the ordinary term, or an article or contribution to a newspaper or periodical is an incomplete version of the thing intended to be published.

With respect to the deposit in the case of printed books, Section 12 requires complete copies of the best edition--which cannot be page proof. With respect to the deposit in the newspaper, Section 12 requires a copy of the newspaper, which cannot mean page proof of what appears in the newspaper.

Can the obvious intention of these provisions be defeated by taking proof of a writing intended to be printed and published in the perfected printed form in a newspaper, bind it together, and sell it, and present copies of it for registration as constituting two complete copies of the best edition. Can this

January 24, 1938.

Best Edition

First carbon copy

6

The type is set in this instance for the definite and special purpose of enabling this material to be published in a newspaper. It is not set in the manner recognized to be the ordinary and usual one which contemplates publication of the material in book form. In other words, the type is set specifically for the purposes of a newspaper edition of the work. Page proof of this material is then struck off. Instead of using this page proof only for the purpose for which page proof is usually used, to-wit, to give the proof reader the opportunity to check up and see whether the type is correctly set and to check mistakes, it is gathered together, put between paper covers, put on the market and sold. Of course it needs no evidence to make it perfectly clear to the Court or anyone else that the "sales" made of such material are not the sales contemplated in the case of books printed and published in the usual way. What has happened is simply this: that the page proof of material which is intended to serve as a contribution to a periodical and which does ultimately serve that very purpose, is put between covers, and because "certain sales" of this material are made before the actual publication of the material is made in the newspaper, it is called "the best edition" of the work within the meaning of the Act and it is insisted that it be accepted by the Copyright Office for registration.

If this contention can hold this means that the publisher of any book may, in order to relieve himself from the deposit of the book when it is bound and published, following the processes of galley proof, page proof, place the page proof on the market, printed, of course, on paper probably quite inferior to that which the book itself will contain, put a price of 25 or 50 cents on this page proof, arrange to have a number of copies bought and then apply for the registration of the material as copyrighted, backing up the request that two copies of the page proof ^{are} for the Library of Congress. The effect upon the Library collection, if this is a correct interpretation of the Copyright Act, does not call for comment.

To justify this construction of the Act the Court must find that the "best edition" meant, in the minds of the legislators, a collection of the page proof of the material.

The petitioner says that since this is the only edition it must necessarily be the best edition. He does not point out that it also necessarily must be the worst. He will admit, of course, that if two editions of a completed book -- a book bound and printed to comply with the idea of the book in the mind of Congress -- published at the same time, one being an inferior edition and one a superior one, the Copyright Office could under the law demand the \$5. edition instead of the \$1. edition. And yet he tells you that by stopping in the middle of the process -- that is by getting no farther than the copying of the page proof from the type -- knowing that that page proof is to be used in completing the work on the material when this page proof is published in its ultimate form, that this constitutes the best edition of the work.

See next page.

CLB-KGC

January 24, 1938.

Page 2.

The question is not being raised here as to whether or not by virtue of such publication — the publication of page proof — the applicant may not have secured his copyright as provided in Section 9 of the Act. The securing of the copyright by the applicant on the one hand and the registration of the claim thereto by the Register of Copyrights on the other are two utterly distinct things. It is true that the securing of the copyright in published material is something which must happen before registration can be considered in the Copyright Office. But it by no means follows that one's copyright is in this way secured — that the securer thereof is entitled to demand registration. On the contrary in addition to publication with adequate notice there must, if registration is to be granted, be a deposit with the Copyright Office of the copyrightable material in such form as was contemplated by Congress in the statute. Registration without such deposit is by direct inference denied in Section 10.

Of course it will be remembered that this is really no new question as far as the Department of Justice is concerned, for in the power of the Register to refuse to register material presented in the way of deposit and in the form of page proof was upheld. The Register must, in order to administer his office adequately, always have the discretion to determine whether or not material made the basis of a claim of copyright is in fact material made copyrightable under the Act. This fact was established at an early date in the interpretation of this statute in connection with works of art. The dispute was between the Register and the applicant for registration as to whether certain material was a work of art within the meaning of the statute. The question of the Register's power to pass on this was submitted to the Attorney-General, who held in that the Register must have that power.

The facts of the case will probably be sufficient of themselves to disprove arbitrary action on the part of the Register. The question then will come as to his discretion in refusing to accept this material for deposit. How this discretion is to be denied seems difficult on general principles to determine and more difficult in view of the action taken by the Attorney-General in the two cases just referred to.

It is safe to say that if the Court finds that this discretion is vested in the Register, the fact that the Court might think that the Register's interpretation of the Act was unsound would not mean that mandamus would be granted.

C.L. Bouvé
Register of Copyrights.

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5 X

MEMORANDUM re MANDAMUS

It is the obvious purpose of the deposit provisions that the deposits made and accepted by the Copyright Office shall be in the complete form in which they are actually issued to the public. That this principle is sound appears very distinctly from the provisions both of the law of 1870 and of the present Act, that there shall be deposited in connection with the application for registration, two copies of the best edition of the copyrighted book.

Now I must assume that any court would take judicial notice of the fact that the page-proof of a book or writing is not the form in which the material in question is intended to be issued to the public. The existence of page-proof itself constitutes prima facie evidence of the fact that it is a physical manifestation of the first step in the process of producing a book for public consumption. It is page-proof for no reason other than that it is to serve as an instrumentality for preparing the subject-matter of the page-proof for actual publication.

If it is true--as demonstrated a score or a hundred times a day by the examination of the material in the nature of books which accompany applications for registration--that the deposits so submitted are in fact in the precise form in which books are normally issued to the public, may that principle be violated by the transparent device of binding page-proof, placing the same on sale and/or making a pretense of selling it to the public, pending the sale of the material in its ultimate and completed form in the shape of a book or contribution to a periodical or newspaper? All men know that the ordinary use of the term "edition" does not mean page-proof, for editions in the ordinary accepted meaning of the term are not issued to the public in the form of page-proof. There can be no doubt that Congress, in the use of the term best edition, contemplated books or articles in their completed form. Page-proof is the intermediate process in the construction of a book, and the words of the Act, and the whole history of copyright legislation, refute the suggestion that deposits of literary works, taking the form of an incomplete process in preparing them for issuance to the public, should be accepted by the Copyright Office as meeting the intentment of the law and the needs of the Library.

For quite aside from the above considerations comes the further vital consideration--a point which must be carefully considered by the Register of Copyrights in connection with the acceptance of any deposit--that the law is plain that the purpose of filing these deposits is not a step essential to the securing of a copyright, but that the copyright is actually secured by publication with adequate notice. The primary purpose

of the deposits is to insure that the Library of Congress shall be enriched and the public thereby served, and only secondarily for the purpose of registering the claim of copyright. It is inconceivable that it was the purpose of Congress that books could be accepted in page-proof form and in that shape be placed upon the shelves of the Library of Congress and thus put the Government to the prodigious expense of reprinting them with the page-proof as its guide in order to make them available to the reading public.

A book in page-proof form is not complete, nor can the selling of it to the public in page-proof form make it complete. To rely upon the proposition that the contents of material in page-proof shape constitute a complete book, that two copies of the page-proof have been filed, that copies thereof have been offered to the public for sale, that the proper application card has been filled out and the appropriate fee sent to the Register, and that registration must therefore be made--is an attempt to obtain registration, not "upon compliance" with the provisions of the law, but by a transparent device to circumvent those provisions by applying the literal words of the law to a deposit which does not constitute the material which the Register is intended by the law to accept as a deposit such as the various Acts of Congress dealing with copyright have ever intended should form part of the collections of the Library of Congress.

Page-proof can never constitute a best edition of a work, for in itself it is evidence (a) that in the physical construction of the book or article there is something yet to follow, and consequently (b) that it is nothing but an incomplete, temporary copy. The contention that publication in its completed form--in a newspaper or periodical or bound book form--is republication, seems but a specious argument put forward for the purpose of concealing the actual facts with no gain to the Library. Even granting it may be a kind of republication, it is not republication of material that has already been published in complete form--that is to say, the form which deposits must bear in order to justify their acceptance for the purposes of the registration of a claim of copyright or for their inclusion in the collections of the Library of Congress for the enrichment thereof.

It seems clearly within the sound discretion of the Register to determine whether or not books or writings which are submitted as deposits in connection with claim of copyright for registration constitute the "best edition", or whether they are in the form which the legislators could be deemed to require in fulfillment of the mission of enriching the Library of Congress. It is believed that for the Register to conclude that the page-proof of a book does not constitute a "best edition" thereof--to conclude that such page-proof in itself proves that it is not a best edition--and that it was not the purpose of Congress that the shelves of the Library of Congress should be encumbered or the public served by page-proof material, would not be an arbitrary exercise of his discretion.

U. S. Register Overruled In Comic Strip Fee Case

By STEPHEN J. MONCHAK

PRESENTED in the form of a book, page proofs of comic strips intended for newspaper publication are registrable for copyright purposes upon payment of a single \$2 fee, the District Court of Washington, D. C., held last week in an opinion which overrules the Register of Copyright on an issue of great importance to the syndicate field.

Since he took office in 1936, Register Clement L. Bouve has insisted that preparation as page proofs was a mere preliminary to the intended purpose, namely, publication in newspapers; accordingly, that one copy of a newspaper containing each day's strip must be offered for registration, with a \$2 fee accompanying each.

Sought Separate Fees

Printed in book form, releases of a strip "In Old Chicago," had been offered for single registration by Twentieth Century-Fox Film Corp., a \$2 fee being offered simultaneously. Col. Bouve refused registration, holding that each day's supplement must be separately filed, each accompanied by a \$2 fee. And, the Register ruled, the copy must be in the form of a newspaper carrying the daily release. It was not demanded that a copy of each newspaper carrying any one strip be recorded and payment made for each; one copy of any newspaper carrying the release for a given day would suffice for that day's drawing, it was explained.

As a necessary incident to qualifying for registration, Twentieth Century-Fox Film Corporation offered for sale, and sold, several copies of the book containing page proofs.

The issue raised and determined in this case by Justice Jennings Bailey is identical to the question posed in a suit filed by KING FEATURES SYNDICATE against Register Bouve. King had offered bound page proofs with a single \$2 fee accompanying each bound volume, and the Register had refused to extend copyright protection. As in the Twentieth Century-Fox case, King has applied for a writ of mandamus to compel Bouve to perform his ministerial duty.

The case just decided in the District Court affects only comic strips, whereas the King case involves strips and columns of various description. Court attaches were unwilling to pre-judge the latter suit in public comment, but said privately that the moving picture company's court victory undoubtedly

will be persuasive in the syndicate case. Application for review of the decision was being considered this week. ✓

DISCRETION, LAW

Even though a question of law be raised by an order of the Postmaster-General excluding matter from the mails, the court will not interfere unless clearly of the opinion that the order is wrong. Bates & Guild Co. v. Payne, 194 U. S. 106.

Every series of printed papers published at definite intervals is not necessarily a periodical within the meaning of the provisions of the act of March 3, 1879, c. 180, 20 Stat. 355, defining second-class mail matter.

Books that are expressly embraced by § 17 of the act of March 3, 1879, as third-class matter and subject to the higher rate of postage cannot be made second-class matter by simply publishing them at regular intervals even though, as in this case, purporting to be a series of adventures of the same person. Houghton v. Payne, 194 U. S. 88. "Periodical" as used in the act of March 3, 1879, implies that no single number of a series is a complete book in itself.

As a general rule, with few exceptions, a printed publication is a book within the meaning of § 17 of the act of March 3, 1879, when its contents are complete in themselves, deal with a single subject, need no continuation and have appreciable size; and so held that the publications involved in this case are books and not periodicals.

Where the point to be decided is a pure question of law which can be reviewed by the courts, the Postmaster-General satisfies the requirements of the act of March 3, 1901, c. 851, 31 Stat. 1099, 1107, by simply hearing the party claiming to be aggrieved by an order excluding matter from the mail; and one so heard and who is not prevented from offering material evidence cannot complain in the court reviewing the order that he was denied a hearing under the act

34 App. D. C. 521 and 535, affirmed.

(Smith v. Hitchcock, 226 U. S. 53')

The act states sec 15) that all lithographic work shall be done in the U. S. except where the subject is located in a foreign country and illustrate a scientific work or reproduce a work of art. P. contended that the register had no authority to demand a statement as to where the prints were made, and that they are reproductions of a "work of art".

COPY OF LITHOGRAPHIC PRINTS

Vol. 30 Op. A. G. 422, 424, 425

In the issuance of copyrights for lithographic prints, the Register of Copyrights is vested with some discretionary powers of investigation and may require a satisfactory showing of compliance with the plain conditions prescribed by the copyright law. *Ex. whether the lithographies were made in the U.S.*

Whether certain lithographic prints produced in Germany are "works of art" within the meaning of section 15 of the copyright act of March 4, 1909 (35 Stat. 1078), is a question of fact which should be determined by the Copyright Office, rather than by the Attorney General.

(p. 422)

The suggestion that the determination of the validity of the registration should be left to the courts, and the necessary inference involved that the duty of the register is purely automatic, and consists wholly (with the single exception of books) in determining whether the subject presented is a lithographic print and therefore within the general class of articles which may be copyrighted, can not be reconciled with the power vested in the register to issue rules and regulations under which he will permit registration under the law. That section of the law plainly indicates that he has at least some measure of discretion in the administration of the act. Manifestly, in the exercise of that discretion he may make such investigation and require such showing of compliance with the law as may be necessary to enable him to determine whether the prerequisites imposed have been met.

Considering the matter from another viewpoint, section 55 of the copyright act provides:

"That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office;" and--

"Said certificate shall be admitted in any court as prima facie evidence of the facts stated herein."

If the contention be correct that the register is vested with no discretionary powers of investigation, and has no authority to demand a satisfactory showing of compliance with the plain conditions prescribed by law as prerequisites to the issuance of copyrights, that officer is reduced to the role of a mere automaton, who, upon receiving an application for copyright of a lithograph, must register and issue a certificate therefor, which shall thereafter be accepted in the courts as prima facie evidence of the facts stated therein, even though the legal prerequisites to the valid registration of the copyright may have been wholly ignored. Clearly, such a construction would serve to defeat the purpose and intent of the act.

(PP. 424-425)

LITCHFIELD v. THE REGISTER AND RECEIVER

1. The rule established in Gaines v. Thompson (7 Wallace, 347), that the courts will not interfere by mandamus or injunction with the exercise by the executive officers of duties requiring judgment or discretion, affirmed and applied to registers and receivers of land offices.
2. The fact that a plaintiff asserts himself to be the owner of the tract of land, which these officers are treating as public lands, does not take the case out of that rule, where it is the duty of these officers to determine upon all the facts before them, whether the land is open to pre-emption or sale.
3. In such cases, if the court could entertain jurisdiction against the land offices, the persons asserting the right of pre-emption would be necessary parties to the suit.

The principle has been so repeatedly decided in this court, that the judiciary cannot interfere either by mandamus or injunction with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here. In the case of Gaines v. Thompson, decided at the last term of this court, the whole subject was fully considered, and the cases in this court examined. The doctrine just stated was announced as the result of that examination.

* * * *

The lands in controversy are situated within the land district over which these officers have authority to receive proof of pre-emption, and grant certificate of entry. There are within that district, of course, lands open to sale and pre-emption. There would be no use for the land office if there were not. The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them.

DISCRETION, LAW

Good

Allen v. United States Ex Rel. Regina Music Box Co.,
22 App. D.C. 271, is a mandamus action to require the Commissioner of Patents to register a label.

The label presented was of an ornamental design with the word "Regina". But it was not descriptive of the articles to which it was applied, to wit, music boxes.

The Court said (p. 274):

We are not prepared to say that the statute imposing the duty in this case requires the performance of a simple, ministerial act, and is so plain in its terms as to admit of no room for construction. The Commissioner was called upon to decide whether the thing presented for registration was or was not a label as defined by the statute.

L A W

DISCRETION

Good
U. S. ex rel. Lincoln Highway Association v. Ewing, Com-
missioner of Patents, 42 App. D. C. 508, 1915 C. D. 94, is
a mandamus action to require the Commissioner of Patents to re-
gister a label.

It was the opinion or judgment of the Commissioner that
registration should be refused. The label, which was submitted
for registration, was not for an article of manufacture, as
required by the Act of 1874, but instead for a highway.

The court said -

It may well be that the Commissioner erred in
his opinion, but we are powerless in this pro-
ceeding to review his decision. The mere fact
that he may have erred will not justify the
issuance of the writ.

Note: From the very character of the material sub-
mitted, there was a clear doubt in the mind of the Register
whether there had been a bona fide publication.

The material was so obviously intended for serializa-
tion in the newspapers that he elected to receive the news-
paper rather than the loss of full page proof.

Godfrey;

Report No. 2222 (accompanying the 1909 bill) was put in evidence, by plff for the sake of the remark on p. 20 in re rules; "Section 53 provides for the making of rules and regulations and does not confer upon the Register any judicial functions"

On the other hand, at the bottom of p. 10 this appears:
"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration".

Obviously, the Register must exercise his discretion to determine whether or not "what must be done" has in fact been done. ~~judging~~xxxxxxxx basing his judgment upon the application and deposit made in support thereof

That his functions are not purely ministerial is demonstrated by the fact that, ~~in~~ for example, under Sec. 5 the applicant shall state to which of the enumerated classes his work belongs, but the Register is not obliged to accept the applicant's classification. If applicant designates his work as a periodical, but the Register deems it is a book, the Register may demand the affidavit required for a book in Sec. ~~17~~ 16. The applicant may designate his work as a "work of art", but (as the Attorney General has declared) it is for the Register to determine whether or not it is a work of art. Or if the applicant designates his work as a "design for a work of Art", the Register may find that it is in fact a design for an article of manufacture, and refuse to register on the ground that the work comes within the design patent law (R.S. 4929)

Handwritten: HAST

relied upon, reads as follows:

When a petition for the institution of public-use proceedings, supported by affidavits, is found, on reference to the primary examiner, to make a prima facie showing that the invention involved in an interference or disclosed in an application believed to be on file had been in public use or on sale two years before the filing of the application, or before the date alleged by an interfering party in his preliminary statement, a hearing may be had before the commissioner to determine whether a public-use proceeding should be instituted. If instituted, times may be set for taking testimony.

It is well settled that mandamus will never lie to control the actions of an executive officer where such actions relate to matter involving the discretion of that officer. See for example *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316-325; *Wilbur v. U. S. ex rel. Kadrie*, 281 U. S. 206; and *American Telephone and Telegraph Co. v. United States*, 299 U. S. 232.

In the first of these cases the court said:

Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself.

In the last case, the court said:

This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers.

That the general ruling applies to the actions of the Commissioner of Patents is equally well settled as shown by a long line of decisions of the Supreme Court of the United States, the Court of Appeals of the District of Columbia, and of this court. These are exemplified by *Butterworth v. Hoe*, 112 U. S. 50, 1884 C. D. 429; *Ewing, Commissioner of Patents v. U. S. ex rel. Fowler Car Co.*, 244 U. S. 1, 1917 C. D. 409; and *American Gas Accumulator Co. v. Coe*, 84 F. (12d) 398, ___ App. D. C. ___, 1936 C. D. 39.

In the Fowler Car Company case, the court said:

Section 4904 [R.S.] concerns and regulates the administration of the Patent Office, and the utility of the discretion conferred upon the Commissioner is demonstrated by his answer in this case.

Judgment reversed and case remanded with instructions to reverse the judgment of the Supreme Court of the District of Columbia and direct it to discharge the rule and dismiss the petition.

In the Gas Accumulator case the Court of Appeals said:

But we are confronted with a more conclusive reason why mandamus will not lie in this case. The Commissioner of Patents, in considering an application for a patent, is vested with authority to determine whether or not an interference shall be instituted, and to pass upon the proceedings in interferences. In the exercise of this authority he acts in a quasi-judicial capacity, and his discretionary action in this respect cannot be controlled by mandamus or injunction.

That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed. * * * It is suggested that the writ was erroneously awarded by the court below, on the ground that the decision of the Commissioner of Patents, in favor of issuing the patent to the relators, was erroneous in law upon its face. But that question does not arise upon this record. We have adjudged that it belongs exclusively to the Commissioner to decide the question for himself, whether a patent ought to issue. *Butterworth v. Hoe*, 112 U. S. 50, 67, 68.

Before taking up the questions raised by the petition, it is deemed expedient to point out what is the meaning of the terms "interference" and "public use proceeding".

An interference is a proceeding instituted in the Patent Office for the purpose of determining which of two or more applicants for patent, who are making claims for the same invention, was the first to have made that invention.

Such a proceeding is instituted as a means of complying with the provisions of Section 4904 R. S. (U.S.C. Title 35, sec. 52).

That section reads as follows:

Whenever an application is made for a patent which, in the opinion of the commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, within such time, not less than twenty days, as the commissioner shall prescribe.

There is no provision in the statutes as to the procedure to be followed in interferences and such procedure is that set out only in the Rules of the Patent Office which were adopted under the authority of Section 483 R. S. (U.S.C. Title 35, sec. 6), as pointed out by the Court of Appeals of the District of Columbia in *Lowry et al. v. Commissioner of Patents*, 26 App. D. C. 8, 1905 C. D. 643.

Those rules provide, inter alia, for the bringing and consideration of motions to dissolve. Such a motion is analogous to a motion to dismiss a bill in an equity suit for want of equity. One ground on which such a motion may be brought where an interference involves only applications, is that the claims in issue are not patentable over the prior art; or, when a patent is involved with an application filed later than the application on which the patent was issued, that the claims are not patentable to the applicant in view of prior art effective against the application involved, but not effective against the earlier filed application of the patentee.

The purpose of such a motion is to settle the controversy with the least expense by saving the taking of testimony on the question of priority, if it is found that no valid patent can be issued after that question is determined.

Section 4886 R. S. (U.S.C. Title 35, sec. 31) provides that no patent may be issued for that which was described in a patent or printed publication prior to the applicant's invention or more than

two years prior to the filing of his application; or was in public use or on sale before the applicant's invention or more than two years prior to the filing of his application.

The prior patents and publications can be found in the records of the Patent Office, libraries, etc., but the Patent Office has no means for discovering whether prior public uses exist.

Sometimes facts are brought to the attention of the Patent Office which it is claimed show that a certain invention had been in public use or on sale for more than two years prior to the filing of an application for patent thereon. This may happen, for example, when an applicant copies claims from a patent granted on an earlier filed application and the public use was later than, or at least not more than two years prior to, the patentee's application.

Since under a very early ruling of this court (In re Frederick von Hefner-Alteneck, 1883 C. D. 33) claims of an application for patent may not be rejected on affidavits of other parties, the practice has grown up of instituting a proceeding in which testimony may be taken pro and con on the question and it is then determined whether a bar of public use or sale exists to the grant of the patent.

Such a proceeding is referred to as a "public use proceeding".

It is important to note that there is no statutory provision for such a proceeding and that Rule 11 of the Rules of the Patent Office states no definite circumstances under which such a proceeding must be instituted. The rule merely states that under certain circumstances a hearing may be had to "determine whether a public use proceeding should be instituted" and that "if instituted" "times may be set for taking testimony". (Underscoring added.)

Obviously under the very terms of the rule it is for the Commissioner to decide whether in any given case such a proceeding will be instituted. The practice has grown up of not instituting such a proceeding where an interference has been set up between two applications and the alleged public use would be a bar to only one of them or where the

interference is between an application and a patent and the patentee alleges the existence of a public use which, if established, would show that his patent should not have been granted. The latter arises from the fact that the Patent Office will not permit a patentee to impeach his own patent.

In many cases the determination of the question whether a public use proceeding will be instituted rests upon matter of expediency. That the question whether a public use proceeding should be instituted is one falling within the scope of the discretionary authority of the Commissioner of Patents is shown by the decisions of the Court of Appeals of the District of Columbia in U. S. ex rel. Dunkley v. Commissioner of Patents, 42 App. D. C. 176, 203 O. G. 603, and U. S. ex rel. Dwigins v. Commissioner of Patents, 43 App. D. C. 204, 214 O. G. 1025.

In the first of these two cases it was sought to compel the Commissioner to discontinue a public use proceeding. In holding that a writ of mandamus had been properly refused, the court said:

The jurisdiction of the Commissioner in the premises, therefore, is not questioned. The ground of attack is the manner of the exercise of that jurisdiction. In other words, the real contention of appellants is that if the Commissioner is permitted to proceed in the manner indicated he will commit error. It is apparent at once that appellants overlook the fact that mandamus cannot be made to perform the function of an appeal or writ of error, and that it ordinarily will not be granted if there is another legal remedy, nor unless the duty sought to be enforced is clear and undisputable.

Then after saying that it might well be that a defeated party in an interference ought not to be permitted to take so inconsistent a position as that taken by the party who asked for the institution of public use proceedings, the court said:

But that is a question for the Commissioner and not for this court.

In the second of the two cases it was sought to have the Commissioner directed to withdraw an order dissolving an interference

and directing that claims be rejected on the ground of public use as established by the testimony in the interference. Mandamus was held to have been properly refused.

In a number of cases the Court of Appeals has held that the Commissioner was not required to suspend an interference and consider questions of public use. See Marx v. Brown, 57 App. D. C. 177, 1927 C. D. 189, and cases cited therein.

In Burson v. Vogel, 29 App. D. C. 388-396, one of those cases, the court, after stating that the question of public use could not be raised on appeal from an award of priority, said:

The question is one for the consideration of the Commissioner on the final allowance of a patent.

The thing which, to use an expression of Judge Learned Hand's, the Bar is slow to learn, is that not every decision of the Commissioner of Patents is reviewable on appeal to a court and that the lack of such right of appeal affords no basis for a mandamus.

In U. S. ex rel. Lincoln Highway Association v. Commissioner of Patents, 42 App. D. C. 508, 1915 C. D. 94, the Commissioner of Patents had refused to register a label, holding that under the provisions of the Act of 1874 it was not registrable. Having no right of appeal from that decision, a petition was filed in this court asking for a mandamus to compel registration. The Court of Appeals affirmed the decision of this court refusing the mandamus and in its decision said:

The contention of relator is, not that the Commissioner was without jurisdiction to act, or that he refused to act, or that the statute peremptorily required him to act in a certain manner, but that he erred in his decision. We are therefore called upon to substitute the writ of mandamus for a writ of error. This cannot be done. It may well be that the Commissioner erred in his opinion, but we are powerless in this proceeding to review his decision. The mere fact that he may have erred will not justify the issuance of the writ.

Whether he decided right or wrong is not the question. Having jurisdiction

to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. (United States, ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316; 47 L.Ed., 1047; 23 Sup. Ct. Rep., 698.)

So here the contention, however much it may be disguised by many words, is that the decision is wrong and this court is asked to compel the Commissioner to vacate it and do what he had decided should not be done.

Throughout the petition extensive use is made of the word "arbitrary", as if by such repeated use basis for action by the court could be established.

Taking up the various actions complained of, can it be said that the holding that a prima facie case of public use was not made out, either by the use of the "Barnes" machine or by the use of the "Timken" machine, was arbitrary. On the contrary, right or wrong, it was the considered determination of the Assistant Commissioner made after a review of the evidence offered and as said in Riverside Oil Co. v. Hitchcock, 190 U. S. 316, "Whether he decided right or wrong is not the question".

Was there anything "arbitrary" in refusing to consider a further showing when everything contained therein could have been presented originally? Was it not incumbent upon petitioner, who was asking to have the interferences suspended and the public use proceeding established, to put in his entire showing with his original petition?

Nor does the fact that the Assistant Commissioner later withdrew his holding as to the "Barnes" machine show that the first decision was "arbitrary", especially as the record shows it was done in view of the ruling of the United States Court of Customs and Patent Appeals in the Bertram decision which was rendered after the first decision of the Assistant Commissioner.

Was there anything arbitrary in holding that a prima facie case of public use was not made out by the use of the "Timken" machine? The evidence offered is not and can not be before this court and how can this court, without seeing the evidence determine that the Commissioner's holding in that respect was in error. Even if the court concluded it was in error, would that, in view of the decisions above cited, furnish any ground for a mandamus directing the Commissioner of Patents to institute a public use proceeding relative to the claims in issue in Interference No. 72,856?

Can the court substitute its judgment for the judgment of the Assistant Commissioner and find a basis for issuing a writ of mandamus because it is of the opinion that if the original petition had been before the court, a different conclusion would have been reached?

Mandamus can never take the place of an appeal.

Nor can any basis for issuing a mandamus be found in the declaration of Interference No. 73,695, between the Alden application and the Svenson application.

The examiner was of the opinion that they were claiming the same invention and while in the decision of October 31, 1936, it was stated that such an interference would not be declared until the petition for a public use proceeding was determined, the facts stated in the petition for mandamus show that that interference was not declared until after the petition for the institution of the public use proceeding was denied.

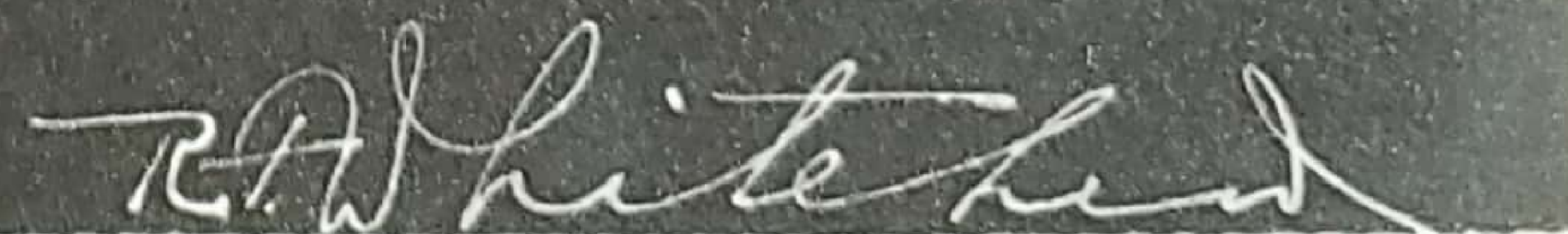
The statute (Sec. 4904 R. S.) provides for the declaration of interferences while, as above pointed out, there is no statutory provision for the institution of a public use proceeding.

The Assistant Commissioner clearly pointed out in his last decision why he deemed it expedient not to institute the public use proceeding at this time, leaving that matter to be considered after the termination of the question of priority. Such an action was held by the Court of Appeals above cited to be clearly within the statutory discretionary authority.

To recapitulate. Mandamus will not lie to review a discretionary action of an executive officer and it will never take the place of an appeal and the latter statement is just as applicable to a case where the statute provides no appeal as it is to one where such an appeal is provided.

It is submitted that petitioner has presented nothing which could offer any basis for requiring the Commissioner to undo what he has done and compel him to do what in his judgment should not be done, viz. to suspend the interferences and institute a public use proceeding.

It is further submitted that the petition for mandamus should be dismissed, with costs against the petitioner.


Solicitor for the Patent Office,
Attorney for Respondent.

November 9, 1937.

DECISIONS IN PATENT AND TRADE-MARK CASES

U. S. Court of Appeals for the District of Columbia

SVENSON

v.

COE, COMMISSIONER OF PATENTS

No. 7,125. Decided December 19, 1938

[— F.(2d) —]

1. PUBLIC-USE PROCEEDINGS—INSTITUTION IS WITHIN COMMISSIONER'S DISCRETION.

Where the Commissioner found that a prima facie case of public-use was not made out and decided not to hold public-use proceedings in connection with a certain interference and later decided that a prima facie showing of public-use was made out but decided that it was expedient not to hold public-use proceedings until priority of invention was established, *Held* "It would be inappropriate to inquire whether the Commissioner's theories were sound, for the decision to hold or not to hold public-use proceedings is within his discretion."

2. SAME—SAME—DISCRETIONARY ACTION CANNOT BE CONTROLLED BY MANDAMUS OR INJUNCTION.

Held that the Commissioner's discretionary action in deciding to hold public-use proceedings or not to hold them cannot be controlled by mandamus or injunction.

APPEAL from the District Court of the United States for the District of Columbia. Affirmed.

Mr. Richard R. Trexler and Mr. Theodore A. Hostetler for Svenson.

Mr. R. F. Whitehead for the Commissioner of Patents.

Before MILLER, EDGERTON and VINSON, Associate Justices

Edgerton, J.:

Appellant filed in the district court his petition for mandamus to require the Commissioner of Patents to hold "public-use proceedings" in connection with certain interference proceedings involving patents of appellant¹ and an application of one Alden. This appeal is from the dismissal of that petition.

[1] In the Patent Office, the Primary Examiner reported that a prima facie case of public use was made out against Alden. The Commissioner reversed that finding, and decided not to hold public-use proceedings. No statute requires or mentions such proceedings. Rule 11 of the Patent Office provides that, if a Primary Examiner finds a prima facie showing that an alleged invention had been in public use two years before the filing of the patent application, "a hearing may be had before the Commissioner to determine whether a public-use proceeding should be instituted". Even if "may" were expanded to mean "must", appellant would have no cause of complaint; for a hearing was held. The Commissioner later found that he had been in error in ruling that there was no prima facie showing of public use; but he decided that it was expedient not to hold public-use proceedings until priority of invention was established. Appellant objects to the theories on which the Commissioner

acted in reaching both of his decisions not presently to hold public-use proceedings. It would be inappropriate to inquire whether the Commissioner's theories were sound, for the decision to hold or not to hold public-use proceedings is within his discretion. The fact that no appeal lies from his decision does not alter the case.²

[2] The familiar rule that mandamus lies against an officer only when he is refusing to perform a plain duty has been applied not only by this court³ but by the Supreme Court⁴ in proceedings against the Commissioner of Patents. This court has repeatedly refused to regulate his conduct of interference proceedings. "His discretionary action in this respect cannot be controlled by mandamus or injunction."⁵ His decision to hold public-use proceedings cannot be so controlled.⁶ His decision not to hold them is on the same footing.

In *Steinmetz v. Allen*,⁷ which appellant cites, the Patent Office had refused to permit an appeal which was expressly authorized by statute. In *Coe v. United States ex rel. Remington Rand, Inc.*,⁸ it had refused to permit an amendment which was expressly authorized by its rules.

Appellant complains that the patent authorities, after deciding on October 1, 1936, not to declare a third interference (between Alden's application and an application of appellant) until "the controversy as to public use has terminated", changed their minds and in December, 1936, declared that interference. He says the decision not to declare it was "final", and that the Patent Office had no authority to reverse itself in the matter. He asks that the Commissioner be required to disregard this third interference in considering his course of action with regard to public-use proceedings in the first interference. As the Commissioner's course with regard to public-use proceedings is discretionary, we could not grant appellant's prayer even if his strictures on the third interference were justified. But the declaration of that interference in December was consistent with the earlier decision of October 1; for the Office had in the meantime, on November 21, decided that no prima facie case of public use was made out. Although that decision of November 21 was later modified, we think that in the meantime the controversy as to public use had been "termi-

² *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 23 S. Ct. 698, 47 L. Ed. 1074.

³ e. g., *United States ex rel. Lincoln Highway Association v. Ewing*, 42 App. D. C. 508; *United States ex rel. Societe de Condensation v. Coe*, 67 App. D. C. 207, 91 F.(2d) 238, cert. denied, 302 U. S. 721, rehearing denied, 302 U. S. 776; *United States ex rel. White v. Coe*, 68 App. D. C. 218, 95 F.(2d) 347.

⁴ *Ewing, Commissioner of Patents, v. United States ex rel. Fowler Car Co.*, 244 U. S. 1, 37 S. Ct. 494, 61 L. Ed. 955.

⁵ *United States ex rel. American Gas-Accumulator Co. v. Coe, Commissioner of Patents*, 66 App. D. C. 21, 84 F.(2d) 398, 400; *United States ex rel. Dwiggin v. Ewing*, 43 App. D. C. 204, cert. denied, 238 U. S. 640.

⁶ *United States ex rel. Dunkley Co. v. Ewing*, 42 App. D. C. 176.

⁷ 192 U. S. 543, 24 S. Ct. 416, 48 L. Ed. 555.

⁸ 65 App. D. C. 387, 84 F.(2d) 240.

¹ Nos. 1,924,422 and 1,986,862.

nated" within the meaning of the decision of October 1. At the least, that construction is tenable, and the Office was entitled to adopt it. We need not decide whether cases denying its power to reverse a final decision on the validity of claims or the right of parties to make claims should be extended to preclude reversal of a decision regarding the order in which proceedings to determine the validity of claims should go forward.

Affirmed.

U. S. Court of Customs and Patent Appeals

IN RE MANSON

No. 4,045. Decided December 5, 1938

[99 F.(2d) 974]

1. PATENTABILITY—COP.

Claims for a cop *Held* unpatentable over the prior art.

2. APPEALS—UNENTERED CLAIMS NOT CONSIDERED.

Where the Examiner refused to enter certain claims proposed by appellant after he had taken his appeal to the Board of Appeals and appellant did not petition the Commissioner, as he might have done under rules 68 and 142, to direct entry of the claims, *Held* the Board of Appeals properly declined to consider the proposed claims.

APPEAL from Patent Office. Affirmed.

Mr. Eugene E. Stevens (Mr. Aaron R. Townshend, Jr., of counsel) for Manson.

Mr. R. F. Whitehead (Mr. Howard S. Miller of counsel) for the Commissioner of Patents.

LENROOT, J.:

This appeal brings before us for review a decision of the Board of Appeals of the United States Patent Office, affirming a decision of the Examiner rejecting, for lack of patentability over the cited prior art, claims 30, 31, and 32 of appellant's application for a patent, and we are also asked to review the refusal of the Examiner, affirmed by the Board of Appeals, to enter proposed claims 33, 34, and 35. No claims were allowed. All of the claims are for an article of manufacture.

Claims 30 is illustrative and reads as follows:

30. As a new article of manufacture, a cop in the form of a substantially rigid hollow shell having thin walls of firmly compacted pulp fibres resistant to substantial pressure.

The cited references are: Murphy, 1,037,295, September 3, 1912; Tiffany, 1,367,639, February 8, 1921.

There is also included in the record a patent to Gess, No. 986,379, March 7, 1911. This patent was not relied upon by the Patent Office tribunals, but is referred to in the patent to Tiffany and is a part of the prior art.

The alleged invention, as indicated by the above quoted claim, consists of a core, used in the textile industry and known as a cop, having thin walls, with an integral top, uniformly composed throughout of firmly compacted pulp fibres resistant to substantial pressure.

The patent to Murphy relates to a yarn cone or cop. After describing the drawings the patent states:

As thus illustrated, my invention comprises a paper yarn cone A of pronounced conical formation, having a base or lower edge *a*, and a crown or tip *a'* at the upper

end thereof. The said cone can be made of any suitable material, and as illustrated is made of several layers of paper or *similar fibrous material* pressed together to form stiff sides for the cone, whereby the latter will be of suitable strength and adapted to support the yarn in the usual and well known manner. * * * [Italics ours.]

Figure 3 of the patent drawings shows that the tapered end of the cone is in-turned.

The patent to Tiffany also relates to a winding and shipping cone and discloses a cone which has a cap. The patent stated:

* * * The cap-like member may be molded into shape and may thereafter be applied to the desired cone, or within the scope and purpose of my invention the paper or other material in an unmolded form may be applied to the cone and formed or shaped on the cone.

The Board of Appeals in its decision stated:

Appellant claims as a new article of manufacture a cop formed of a rigid hollow shell with thin walls of firmly compacted pulp fibres. The patents to Tiffany and Murphy both show cops probably made of paper rolled in layers or coils but Tiffany suggests the use of a cap molded to shape. Murphy states the layers of paper or "similar fibrous material" should be pressed together to form stiff sides of the cone. Obviously the paper is formed of compacted fibres.

We do not consider the claims on appeal differentiate from the prior art, at least in any material respect. As a matter of fact, they do not state that the side walls and top are molded to shape but even if they did, it is such common practice to mold similar articles of fibrous material that such construction would be, in our opinion, lacking in patentable merit.

Whether the prior art shows thin walls or not raises a question of degree and has no patentable significance. Murphy shows the top inwardly depressed forming a reinforced end of the shell.

We can add little to this statement of the Board.

The patent to Murphy states that his core—

"can be made of any suitable material, and as illustrated is made of several layers of paper or similar fibrous material pressed together to form stiff sides for the cone, * * *."

Paper is ordinarily made of pulp fibre, and we think the term "similar fibrous material", as used by Murphy, would include pulp fibre. Appellant contends that, even if the Murphy disclosure is broad enough to include pulp fibre, he does not show that it is firmly compacted in the cone, nor does the patent to Tiffany show it. However it seems to us that the disclosure of Murphy that the material used is "pressed together to form stiff sides" must necessarily result in the fibre becoming "firmly compacted".

[1] We are clearly of the opinion that the claims before us define nothing inventive over the references. Appellant further contends that his cop is molded, while the cops shown in the prior art are formed by winding the paper or other material used in their manufacture. Suffice it to say upon this point that the involved claims are not limited to molded cops, and we express no opinion as to whether, if such limitation had been made in the claims, they would be allowable.

There is found in the record an affidavit of one Clements stating that the cop cones produced by appellant are a commercial success. In view of the fact that we are clearly of the opinion that the claims are not allowable, this affidavit may not be resorted to in aid of patentability, but we do call attention to the fact that the affidavit seems to place the commercial success of appellant's product upon the fact that it is molded, which fact, as hereinbefore stated, is not here involved.

Appellant assigns error by the Board of Appeals in failing and refusing to give due consideration to the patent to Gess.

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March 14, 1939

Trade-Marks	255—No.	365,521 to No.	365,775, inclusive.
Labels	39—No.	52,626 to No.	52,664, inclusive.
Prints	8—No.	17,270 to No.	17,277, inclusive.
Reissues	5—No.	21,027 to No.	21,031, inclusive.
Plant Patents	1—No.		318
Patents	750—No.	2,150,142 to No.	2,150,891, inclusive.
Designs	128—No.	113,701 to No.	113,828, inclusive.
Total			1,186

Trade-Mark Registrations Canceled

196,502. Radio supplies and wireless equipment. Alexander S. Hecht, doing business as Dual Loud Speaker Co., New York, N. Y. Registered March 17, 1925. Canceled February 10, 1939.

253,070. Canned corn. Blue Earth Canning Company, Blue Earth, Minn. Registered February 19, 1929. Canceled February 3, 1939.

308,652. Humidifiers. American Radiator Company, New York, N. Y. Registered December 12, 1933. Canceled February 7, 1939.

308,659. Pipe fittings. American Radiator Company, New York, N. Y. Registered December 12, 1933. Canceled February 7, 1939.

339,668. Powder for cleaning false teeth. Edward H. Heil, doing business as Heil Products Co., Cleveland, Ohio. Registered October 13, 1936. Canceled February 10, 1939.

344,571. Medicine. Harry Tomback, doing business as Tomil Research Laboratories, New York, N. Y. Registered March 30, 1937. Canceled February 3, 1939.

351,522. Heating and forced draft ventilating units. Ford-Aire Inc., Detroit, Mich. Registered November 2, 1937. Canceled February 10, 1939.

359,937. Coal. John C. Stuver, Barberton, Ohio. Registered September 6, 1938. Canceled February 3, 1939.

361,093. Certain named piece goods. The H. & H. Mfg. Co., Inc., Quidnick, R. I. Registered October 4, 1938. Canceled February 10, 1939.

Label Registration Canceled

51,284. Dry sherry. Allen-Diaz, Inc., New York, N. Y. Registered June 14, 1938. Canceled February 3, 1939.

Adjudicated Patents

(C. C. A. N. C.) Rogers patent, No. 1,457,188, for multiple hole top for burner stoves, *Held* invalid, and if valid, not infringed. *Montgomery Ward & Co. v. Rogers*, 100 F.(2d) 721.

(C. C. A. Del.) Rosenberg patent, No. 1,809,758, for fastener, *Held* invalid. *Rosenberg v. Shakeproof Lock Washer Co.*, 100 F.(2d) 811.

(C. C. A. Del.) Rosenberg patent, No. 1,827,615, for fastener, *Held* invalid. *Id.*

(C. C. A. Calif.) Cavaglieri patent, No. 1,971,331, for building reconstruction, claims 2, 5, 6, 7, 8, 9, and 11 *Held* invalid. *Marquis v. Los Angeles City School Dist. of Los Angeles County*, 100 F.(2d) 788.

Adverse Decisions in Interference

In interferences involving the indicated claims of the following patents final decisions have been rendered that the respective patentees were not the first inventors with respect to the claims listed:

Pat. 2,035,409, R. F. Ruthruff, J. K. Roberts, and M. T. Carpenter, Olefin concentration and polymerization, decided February 14, 1939, claims 2 and 13.

Pat. 2,105,089, Erle Martin, Mechanical synchronizing device, decided February 15, 1939, claims 6, 7, and 8.

Renewal of Forfeited Cases

A petition for the renewal of a forfeited application need not be signed by the inventor or assignee, but may be signed by the attorney.

A power of attorney in the original application authorizing an attorney to transact all business in the Patent Office in connection with the application construed to be of sufficient scope to include the signing of a petition for renewal and the subsequent prosecution of the application. (*Ex parte Agee*, 101 O. G., 1609.)

May 26, 1938.

DISCRETION
MEMORANDUM re "IN OLD CHICAGO"

For various reasons it has been thought proper to ask leave for the amendment of the answer to the petition setting out that the "In Old Chicago" material, as presented for registration, does not, for the purposes of Section 12 of the Act, constitute a book; but, on the contrary, does for such purposes constitute a contribution to a newspaper.

In this connection attention may be called to the fact that in the course of correspondence with the petitioner it was pointed out that the nature of material fundamentally intended to serve as a contribution to a newspaper could not be changed by the simple process of sewing proof sheets of this material together, binding it, and calling this accumulation of prospective newspaper contributions a book. The principle announced and the reasons for it find definite authority in the case of Smith v. Hitchcock (225 U. S. 53, 56, 59 and 60.)

The point involved in that case was the right of Postmaster General Hitchcock to characterize, for the purposes of the Postal Laws, certain material as a book, which had for the preceding fifteen years been characterized by his predecessors as periodical material. Under those regulations periodicals came into what was known as a second class and books into a third class. The decision of the court was that for the purposes of the administration of the Postal Laws the Postmaster General had the right to determine what material constituted a periodical and what a book.

Referring to prior cases, Bates & Guild Co. v. Payne (194 U.S. 106), American School of Magnetic Healing v. McAnnulty (187 U. S. 94), Public Clearing House v. Coyne (194 U. S. 497), Houghton v. Payne (194 U. S. 88) and Smith v. Payne (194 U. S. 104), Justice Holmes, who rendered the opinion of the court, said:

"It is established by the same authorities, that books, that are expressly embraced in mail matter of the third class by section 17 and so made liable to a higher rate of postage, cannot be removed from that class and brought into the second [periodicals] by the simple device of publishing them in a series at regular intervals of time." (pp. 58-59)

And again:

"The word book also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present section 17 [of the Postal Regulations]. As books are not

turned into periodicals by number and sequence, the magazines are not brought into the third class [books] by having a considerable number of pages stitched together."
(p. 59)

Herein, it seems to me, is found ample and conclusive authority for the proposition advanced by the Register of Copyrights as one of the grounds for refusing to accept registration of the material entitled "In Old Chicago" in the form in which application for the registration thereof was made. The material was, beyond any question, basically intended for publication as a contribution to a newspaper. The form in which it was printed was newspaper form. Ten days before the application for registration had been made, ten of the twenty chapters of the work had already been published in the Los Angeles Daily News.

Section 12 of the Act makes a clear distinction between books and contributions in connection with the nature of the deposits required in the case of each. The requirement for books is "two complete copies of the best edition thereof"; the deposit requirement for contributions is "a copy of the issue or issues in which such contribution appears."

All that the petitioner has done in this connection is to collect proofs of the material which he intends to really distribute to the public for the first time, stitch them together, put a paper cover on them, and call the result a book. While the point has not been specifically raised that the so-called first publication in this "book" form was purely colorable because it was thought this would merely inject an unnecessary feature into a case already somewhat complex, there is no doubt that such publication was, from the standpoint of the intent of the copyright law, a mere device. The law is so clear as to the particular form of the deposit required by Section 12 in the case of contributions to newspapers as to require no elucidation. Just as Justice Holmes observed that, for the purposes of the Postal Regulations, books cannot be transformed into periodicals "by the simple device of publishing them in a series at regular intervals of time," the Register contends that, for the purpose of the Copyright Act, and particularly for the purposes of its requirements as to the nature of deposits, contributions to a newspaper cannot lose their nature by the simple device of assembling them and calling the result a book.

Aside from the fact that it ^{is} ~~is~~ ^{clear} clear, upon general considerations, that the answer to the petition should be amended as above suggested, the above views of the Supreme Court, as announced in the Smith v. Hitchcock case, seem at once to make such an amendment all the more desirable and at the same time afford unassailable authority to sustain the thought conveyed by the amendment, as well as to point out the propriety of the Register's action in refusing registration on this ground in addition to others already suggested.

NOTES

1. No irreparable injury.
2. Courts should not displace the judgment of administrative officers or bodies in matters within their jurisdiction.
3. Presumption of validity attends official action, and the burden of proof to the contrary is upon him who challenges such action.
4. Action clearly within administrative power.
5. Action not capricious or arbitrary.
6. Plaintiff will suffer no irreparable injury.
7. And further answering, defendant avers that his action is not capricious or arbitrary; that his election to receive issues of the aforesaid newspaper containing such contribution in lieu of page proof with the application for registration, is within his administrative discretionary power; that plaintiff will suffer no injury, irreparable or otherwise by the submission of the newspapers with the application for registration; and that the plaintiff has not overcome the presumption of validity attendant upon the official action of the Registrar in this case.
8. Purpose is to enrich Library of Congress. 291 Fed. 714, 715.
9. Two copies of a single work were removed from encyclopedia and deposited. Held this was sufficient. 56 Fed. 764, 770.
10. Galley proof received in Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. (2d) 556.
11. A page taken out of a volume and not complete in itself, is not a book such as may be copyrighted. Scoville v. Toland, Fed. Cases, 12553; 21 Fed. Cases 863, 864; 28 Op. At. Gen. 176 (1916).
12. The Registrar desires that we file an amended bill alleging that material submitted was not a book.
13. On January 26, 1938, the Registrar stood ready and willing to issue a certificate on the basis of the newspaper editions, since in his opinion they then constituted the best edition of the books then published--not the mere page proof alleged to have been published at an earlier date. Form A-5 could have been used by plaintiff on January 26, 1938.

14. According to Mr. DeWolfe we have two legs to stand on. As to one, the position is that page proof is not the "best edition" within the meaning of Section 12 of the statute. As to the other leg, the Registrar has the right to elect which of several available published editions constitutes in his opinion the best edition within Section 12.
15. According to the Registrar the question is this: This material created for one purpose only, used in the past for that purpose and to be used in the future for that purpose, to wit, sale and distribution to the public in the form of contributions to newspapers, which its nature as such material as the outcome of the process of causing separate proofs thereof to be assembled, bound between covers, and the result labeled "a book."

I.

With respect to the points raised in the petition for mandamus, it seems to me that the issue is very clear cut. Let us assume, for the sake of argument, that in connection with the work involved, the publication required by the copyright statute with respect to the securing of copyright has been effected and that copyright protection has been secured by such publication.

(1) The first point to be emphasized in this connection is that in regard to the point of the authority of the Register to register published material and issue a certificate of registration thereof, this authority or duty and the matter of such registration are matters which in the proper case must be regarded as utterly distinct and apart from the question as to whether or not copyright protection has been secured by publication with adequate notice of the material. For while publication with notice, if accomplished in accordance with the statute, undoubtedly does secure copyright protection, it does not necessarily follow that the person who has secured the copyright is entitled to registration. The Copyright Act itself makes this perfectly clear. Section 12 specifically provides that after copyright has been secured, as provided in Section 9, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register of Copyrights, two complete copies of the best edition thereof then published; or, if such work be a contribution to a periodical for which contribution special registration is requested, one copy of the issue or issues containing such contribution shall be deposited with the Register of Copyrights. And Section 10 specifically provides that registration of a claim to such copyright may be had by the person claiming copyright "by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificate provided for in Section 55 of this Act;" and Section 54 provides that registration shall be made "whenever deposit has been made in the Copyright Office of a copy of any work under the provisions of this Act."

By the above, it is made evident that although copyright may have been secured, registration cannot be made by the Register until the copyright claimant shall have deposited the copies required by the Act. Registration has not been refused on the ground that the applicant therefor may not have secured his copyright by virtue of the publication with notice which he has effected. It is denied on the ground that the provision of the Act with particular reference to the deposit of copies has not been complied with.

The petitioner contends that he has deposited copies as required by the Act. The contention of the Register is that while the petitioner has deposited copies, the material deposited is not the material required (1) by the direct terms of the Act and (2) by the obvious intent of the Act. For this reason, the Register feels that he is prohibited, as the result of the provisions of Sections 10 and 54 of the Act, from accepting for registration and registering the material in question.

(2) The material received from the petitioner consists of a number of separate sheets containing printed and pictorial matter obviously made from type set up for printing this material in a newspaper. Each page is printed on one

side only; each page contains a special copyright notice; each page, except the last, contains a statement at the end "To be continued." The reverse side of each sheet is blank. It is obvious from the appearance of this material that each page constitutes a proof sheet of material to be published in a periodical or newspaper and that the work consists of a collection of such separate proof sheets. It is obvious that it has been printed in this particular form in order to be published as a contribution to a newspaper. The question which at once arises is: Does the Act contemplate the registration of a claim for copyright when accompanied by deposits which constitute page proof?

That the copies to be deposited under Section 12 were to meet a certain standard is made apparent by the provision in that section that the copies to be deposited shall be "copies of the best edition thereof then published"—the "then published" clause referring obviously to the copies in existence at the time deposit is made. Under generally recognized rule of statutory construction, words not technical in themselves or calling for some technical interpretation should be given their ordinary meaning in endeavoring to ascertain the intention of the legislator. To give the word "edition" its usual meaning, signifies the complete unfinished form in which books published in editions are available to the public. To every American reader and undoubtedly to every member of the Congress that passed the Act of 1909, the term "best edition" certainly could not have been intended to describe the process of book making at that intermediate stage which page proof invariably represents. The material received in the Copyright Office obviously represents an intermediate stage of the process intended to be perfected when the work was actually published in the periodical or periodicals for which the type was obviously set up. The result of collecting such page proof and selling it to the public certainly does not constitute the material which anyone reading the Act would conclude met the purposes of that Act by constituting the "best edition" required by Section 12 to be deposited with the Copyright Office. To the above extent, then, does the material submitted for deposit in this case fail to meet the requirements of the Act which qualifies the material to be deposited in order to entitle the claim of copyright to registration.

(3) But when we consider the nature of the material offered for deposit from the standpoint of the general intent and spirit of the Act as manifested by making any provision for deposit at all, the question assumes a very more serious aspect than that indicated in the preceding paragraph. Under the Act which preceded the present statute, the deposit of copies was required in order to make possible the securing of copyright at all. Under the present Act, as above set out, copyright is secured independent of deposit by the mere act of publication with notice. This is a vital distinction for the purposes of this case. Under the former Act, the Library was practically assured of the receipt of such deposits. If he failed to make them, the person seeking copyright lost all chance to any statutory copyright protection at all. Having provided in the present Act that that protection could be secured independent of deposit, Congress realized that the securing for the Library collection of such deposits must be obtained in some other way. The method evolved under the present Act was to provide in Section 12 that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

So that under this Act, while copyright is secured by publication with notice without any deposit at all, no suit for infringement can be brought by the copyright owner unless he makes such deposit. This provision was intended to insure, and does insure, that deposit shall be made; and as a further insurance that, by virtue of such deposit, the Library of Congress shall have on its shelves such deposited material as it sees fit to select from deposits made in the Copyright Office, it is provided that if the copyright owner fails promptly to make such deposit and is requested by the Register of Copyrights to make it, and after receipt of such request fails to do so, "the proprietor of the copyright shall be liable to a fine of \$100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work and the copyright shall become void."

Since, under the present Act, deposit is no longer essential to the securing of the copyright, it is appropriate to inquire what purpose the deposit copy serves. That it is to serve a very important purpose at once becomes apparent from the fact that Sections 12 and 13 make it so very worth while from the standpoint of the copyright owner to make such deposits--for unless he makes them, as already stated, he cannot bring a suit for infringement of his copyright, and if he refuses to make them, he is subject to a fine and the loss of the copyright already secured. The answer is to be found in the sections of the Act hereinafter referred to.

First, attention should be called to the fact that part of the penalty for refusing to make a deposit after being requested so to do by the Register of Copyrights, shall be "to pay to the Library of Congress twice the amount of the retail price of the best edition of the work." It should be borne in mind that the ultimate destination of the copies deposited is not the Copyright Office but the Library of Congress. It is the Library of Congress which is entitled to these copies, and if, under the conditions set out in Section 13, it does not receive them from the copyright owner, it shall receive the value of two such copies in money. The Library is the loser and as such loser is entitled to the value of the property which Congress intends that it shall receive--and provides that it shall receive as well. The fact that the purpose of the deposit is to enrich the Library is further made perfectly clear by Section 59 which provides

"That of the articles deposited in the Copyright Office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress including the Law Library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

Here, then, stands plainly revealed in the words of the Act the purpose for which deposits shall serve. This, too, goes far to explain the requirement that the deposits shall consist of the best edition of the work published at the time of deposit. These deposits, as already indicated, are for Library purposes fundamentally and outstandingly. Their place is not in the Copyright Office, and they

are not intended to form part of the records of the Copyright Office.

In the face of these provisions, how can the filing of the page proof of material set up for publication either in the form of contributions to a periodical or what is in common parlance recognized as a "book" serve the definite purposes of deposits as prescribed in the Act. It is apparent that if the page proof of contributions to a periodical are acceptable in the case of contributions to newspapers, they must also be acceptable in the case of scientific works, novels, dictionaries, encyclopedias and every other piece of material recognized as books. Can it be conceived that, the obvious purpose of the deposits being clearly established under Sections 13 and 59 to be the enrichment of the Library of Congress, such enrichment is to be effected by placing page proof material on its shelves? In this connection it should be borne in mind that all that Section 12 requires is that two copies of the best edition published at the time of making the deposit meet the requirements of the Act. This means that once a deposit of the material required by the Act has been made in accordance with the terms of the Act no further deposit of subsequent editions can be demanded of the depositor. It follows that if page proof material meets the requirements of the Act when the book itself is printed and published, copies of the completed work cannot be demanded, and consequently cannot be obtained for the purposes set out in Sections 12 and 59. But it is obvious that the deposit of page proof with the Library cannot meet these purposes. Is it to be thought that it was the intention of Congress that page proof material should "be transferred to the permanent collections of the Library of Congress" or "placed in the reserve collections of the Library of Congress for sale or exchange" or that either the Library of Congress or other departmental libraries of the District of Columbia were intended by Section 59 to accept two copies of page proof "for use therein"? How would the occasion for the sale or exchange of such page proof material by the Library of Congress arise? Who would want to buy the page proof of material which in the course of time has crystallized in the completed book available to the public on the market. For what, of value, could such page proof be exchanged? Why would the Library of Congress or any other governmental library desire to have on its shelves the page proof of material, the completed form of which was on the market? It is obvious that one of the purposes of Section 59 was to provide that the Library of Congress should be furnished with the completed book without cost to the Government. The very impermanence and defects of such material, considered from the standpoint of library collections, would obviously defeat the very purposes set out in Section 59 for which deposits are required. If the Act is susceptible of interpretation that such material is accepted in the form of deposits, it is plain that the purposes of Section 59 must be definitely defeated.

The Federal Courts have already taken judicial notice of the fact that the purpose of these deposits is the enrichment of the Library. In the case of Mittenthal, Inc. v. Irving Berlin, Inc., et al (291 Fed. Rep. 714) the court had before it the question as to whether or not the deposit of copyrightable material with the Copyright Office two weeks before publication would affect the copyright. The court held that it would not, and said inter alia:

The analysis of Section 59 in its connection with the matter of the enrichment of the Library by means of page proof has, of course, for its purpose demonstration of the fact that page proof is not acceptable as a deposit for the purposes of Section 12, and the purpose of the analysis of the clause in Section 12 dealing with deposits required in the case of contributions is to show that in making a deposit of page proof of material from type set for the purposes of producing the contribution to a periodical, it fails to meet the specific requirements of Section 12 covering deposits of contributions to periodicals in that it is therein specifically set out that the deposits in such case must consist of a copy of the periodical in which the contribution appears. Considering the contents of Sections 12, 13 and 59 together, the situation of the petitioner in connection with the present request for registration becomes clear--as do the results which would follow if registration of this material were made in conformity with the application.

In its application the petitioner requests that this material be registered as a book. He could not hope successfully to apply for its registration as a contribution to a periodical because of the specific provision in Section 12 that such deposits must take the form of a copy of the periodical in which the contribution is published, and the material which he sends in is merely page proof thereof. This section, by direct and necessary implication, provides that there will not be accepted in the Copyright Office for the use of the Library page proof of contributions to periodicals--a circumstance which, standing alone, would instantly lead to the inquiry as to why, if the Act provides that deposits of the page proof of contributions to periodicals is not acceptable as a deposit, the page proof of books should be. But the petitioner demands that this be registered as a book. If it is found to be the duty of the Register of Copyrights to register a book containing page proof, it necessarily follows that there must be accepted for registration the page proof of what really are books--a result which, for the reasons set out in the discussion of Section 59, would fail utterly to meet the purposes which deposits are, by the terms of that section, intended to serve. Consequently, the petitioner cannot through the deposit of this material expect registration thereof as a contribution to a periodical, because the specific provisions of Section 12 prohibit this; and he cannot expect registration thereof as a book because the contents of the material sent consists wholly of page proof. And in this connection a final reference may be made to the provision in Section 13 that upon the refusal, after request duly made by the Register of Copyrights, of the copyright owner to send in two copies of the best edition, he shall pay to the Library of Congress "twice the amount of the retail price of the best edition of the work." This provision emphasizes the fact that it is expected that two copies of the best edition will be placed at the disposal of the Library of Congress without the expenditure of government money for that purpose. Its intention is obviously to enable the Library to buy two copies of the best edition because the copyright owner has refused to supply them. To construe the words "the best edition" here used as meaning page proof would be simply to ignore the natural and commonplace meaning of the words.

The Federal courts have already taken judicial notice of the fact that the purpose of these deposits is the enrichment of the Library. In the case of Mittenthal, Inc. v. Irving Berlin, Inc., et al (291 Fed. Rep. 714) the court had before it the question as to whether or not the deposit of copyrightable material with the Copyright Office two weeks before publication would affect the copyright. The court held that it would not, and said inter alia:

"The purpose of the deposit is to secure two copies of 'the best edition' for the Library of Congress as a condition upon the right to protect the copyright

.

"The defendant suggests that the register will be cumbered with publications which may remain unpublished. That must be a slight danger, for a man will seldom deposit copies which he does not publish. But even so, the library is enriched thereby and there need be no confusion, because the register does not issue his certificate till he learns the date of publication."

The above considerations make it clear to the Register's mind that he is without authority to accept for registration material which constitutes page proof of a contemplated publication. But there are other considerations which, if further justification for this interpretation were considered necessary, may be advanced.

(4) As already observed, the material which is the subject matter of this case constitutes page proof of a contribution to a periodical. Contributions to periodicals are given specific treatment in Section 12 of the Copyright Act in connection with the matter of deposit. It is there provided that "if such work be a contribution to a periodical for which contribution special registration is requested, one copy of the issue or issues containing such contribution" shall be deposited in the Copyright Office. As before pointed out, the material involved in this case is struck off from type set for a contribution to a periodical as proof sheets of this contribution have been assembled under a separate title and bound in paper covers. The contention is that this is now the book, the idea apparently being that the classification of the material as a contribution to a periodical vanishes by virtue of the manner in which the page proof has been collated and arranged. There is, of course, no contention that this material is not to constitute a contribution to some newspaper. Of course, the view is not taken by the Copyright Office that material originally typed and printed to constitute a book as opposed to an article for a periodical may not later be retyped so as to meet the newspaper form and actually be republished as a contribution to a periodical. But that is not the case here. Nor is the view taken that material which is intended to be republished as a periodical contribution may be published first in the form of a book and consequently constitute upon publication a book irrespective of plans for its republication in a newspaper. The point is that this material on its face shows it is not printed in the form in which books are published but in the form in which contributions to periodicals are published. If the nature of a book when first published is not changed by virtue of the fact that it is intended at the time of first publication to use it later as a contribution to periodicals, it would seem to follow that material printed for a periodical and in the form of newspaper contributions cannot lose its identity as a contribution by binding the loose page proof sheets together and calling them a book. Now Section 12 specifically states what is required in the nature of a deposit when the material is, in fact, a contribution to a periodical. It

says that the deposit in such case must consist of a copy of the printed periodical containing the article when the former is published. The petitioner will undoubtedly take the ground that a contribution to a periodical does not become such contribution until it is published in the periodical. But the difficulty lies in the fact that what has been submitted here is material already printed in the form of proof sheets of the type from which the contribution is to be printed. The arrangement appears to be no more than a device to avoid the requirements of Section 12 with respect to the type of deposit to be made in the case of literary articles of this kind. For this reason alone the Register feels that registration should be refused in this case, but this consideration sinks into insignificance as compared with the outstanding fact that registration is sought, having for its basis the deposit of page proof material which, for the reasons assigned above, it is felt do not otherwise meet the requirements of Section 12 read in the light of Sections 13 and 59.

II.

The Discretion of the Register in the Premises

The petitioner will probably raise the point that once the material in question has been published with adequate copyright notice, the Register has no discretion with respect to the matter of registration. Reference has been made at a previous page to the obligation imposed upon the Register of Copyrights under Sections 10 and 54 to register and issue certificates of registration only where the provisions of the Act have been complied with by the applicant for registration. As already indicated, the petitioner claims that all the provisions of the Act have been complied with, and the answer of the Register of Copyrights is that one of the fundamental conditions of registration has not been met in that the material submitted for registration does not constitute the type of deposit required by the Copyright Act.

The question of the Register's obligation to accept page proof as a deposit is not a new one. On November 3, 1906, the Acting Attorney General addressed a letter to the President in which he stated that "two copies of very indifferent proof sheets stitched together with a cover title, but no regular title page" did not constitute the "copies of such copyright book" as under the preceding Copyright Act had to be placed on file with the Copyright Office in order to secure copyright. Under Section 4956 of the Revised Statutes, the law then in force, the requirements were, as stated by the Attorney General, that "two copies of such copyright book" were to be deposited to have the effect set out above. It will be noted that under the previous law there was no qualification specified in the law, as there is in the present Act, that the books should be "copies of the best edition." Yet in construing the prior law which did not voice this qualification, the Attorney General was of the opinion that the Register of Copyrights was not authorized to register such proof sheets. One

result of the opinion was, as is apparent, that the discretion to refuse to register the material lay with the Register of Copyrights. It may be added that under the law in question there was no provision corresponding to Section 10 of the present Act, the effect of which was to prohibit registration by the Register in case the provisions of the Act were not complied with.

In an opinion rendered with respect to the present Act by the Assistant Attorney General (Official Opinions of the Attorney General of the United States, Vol. 28, pp. 557-561) the question of the meaning of the term "a work of art" was one of the issues of the case. He said, *inter alia*:

"Furthermore, the meaning of this expression, and its application to a particular work, does not present a question of law but one of fact, and is not, therefore, one for decision by me. The phrase appears to be a new one in the copyright statutes, and experts would doubtless often differ as to its application; and the register of copyrights must, therefore, when application for registration is made, determine for himself the question whether the work presented is one of art, but in so doing he can not, of course, act arbitrarily and without good reason.

"I therefore answer both questions propounded in the affirmative, provided the painting with reference to which the application is made is 'a work of art'; but whether or not it is such a work is a question for the register of copyrights."

It would seem to follow from the above that it is the view of the Attorney General, as expressed in these cases, that whether registration shall or shall not be made both under the old law and under the present Act, depends upon the discretion of the Register—in the one case as to whether or not proof sheets of a book constitute the copy of the book required for registration under the old law, and whether or not an alleged "work of art" is material which can be registered under the present Act. This, of course, provided that there is a real exercise of discretion and a complete absence of arbitrary action.

If such discretion is vested in the Register under the present Act, it would seem necessarily to follow that the discretion as to whether or not registration should be granted does not lie with the courts. For the above reasons, it is not clear to me that an action for mandamus in the present case would succeed.

However, if I am wrong in my opinion, it would be well that a mandamus suit be brought, because as the result the duty of the Register in the premises would be at least preliminarily defined.

DISCRETION OF REGISTER

In support of the contention that the Register has discretion to pass upon the question as to what shall constitute, for the purposes of the Act, complete copies of the best edition of a work, Section 10 is mainly relied upon.

I requote the Section here as follows:

"That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

It would seem necessarily to result from the fact that from the words "upon such compliance the register of copyrights shall issue...the certificate," until such compliance he shall not issue it. In this connection it may be observed that an interpretation to this effect is to be found in the Report of the Committee on Patents, submitted to accompany H.R. 28192, dealing with the present Act. It is stated in this Report:

"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration."

The matter of the duty of the Register to issue a certificate of registration involves necessarily the question of a duty to register--a process which in the nature of things must be regarded as a step which precedes registration. In other words, while Section 10 does not state in so many words that the Register of Copyrights shall register a claim of copyright upon compliance by the applicant with the provisions of the Act, there was no necessity in Section 10 for such specific provision because of the provision in that section that such applicant may obtain registration of his claim to copyright by complying with the provisions of this Act.

This idea is repeated in Section 54 which reads as follows:

"That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof."

Specific emphasis is laid in this Section upon the necessity of the making of a deposit "under the provisions of this Act" a condition precedent to entry thereof by the Register. This undoubtedly means entry of the claim of copyright in the record books of the office, which entry of claim will, of course, set out the name of the copy of the work, claim of copyright to which has been made.

Sections 10 and 54 contain the same idea, Section 10 speaking from the standpoint of the right of the applicant to obtain registration, and Section 54 of the duty of the Register to enter the claim which is made conditional upon the deposit of copies.

In connection with this question of the discretion of the Register to determine the question as to whether a deposit accompanying an application is a deposit which calls for registration within the meaning of the Act, reference has already been made to the opinion of the Attorney General, volume 28, pages 557-561. As already pointed out in a previous memorandum, the Attorney General spoke with peculiar reference to the registration of works of art. He stated that the term "a work of art" appeared to be a new one in the copyright statutes and was one with respect to which experts would doubtless often differ as to its application. He said, further, that whether a particular item was a work of art "does not present a question of law but one of fact, and is not therefore one for decision by me"; and followed this statement up by the assertion that when application for registration of such material is made, the register must determine for himself the question as to whether the work presented is one of art. In view of the fact which appears both from the wording of Sections 10 and 54 read together and the interpretation placed on Section 10 by the Committee in its Report, already referred to, that registration and certification can only be made upon compliance by the applicant with the provisions of the Act; and in view of the fact that one of the conditions of obtaining such registration and certification is the deposit in the Copyright Office of "two complete copies of the best edition" of a book, and the deposit in the case of a contribution to a newspaper of the newspaper in which the contribution is published, it would seem necessarily to follow that whether the deposit in the case of a book constitutes two complete copies of the best edition, or the deposit accompanying an application for registration of claim of copyright in the case of a contribution to a newspaper is a newspaper or periodical, are questions of fact which the Register must determine for himself. Taking as an example "two complete copies of the best edition," and substituting this material in the place of the work of art discussed by the Attorney General, his finding would in his own language, bearing such substitution, read as follows:

"And the Register of Copyrights must, therefore, when application for registration is made, determine for himself the question whether the deposits presented are two complete copies of the best edition, but in so doing, he cannot, of course, act arbitrarily and without good reason. I therefore answer both questions propounded in the affirmative, provided the deposits which accompany the application are two complete copies of the best edition; but whether they are or not is a question for the Register of Copyrights."

And the matter may go even farther than this. In determining what the material is which constitutes the physical manifestation of the writing, application for claim of copyright to which is made, it would seem that the Register would have to answer that question for himself in all cases where the law does not answer it for him.

Section 5 of the Act differentiates between books, which it classifies under subparagraph (a), and "periodicals, including newspapers," which it classifies under subparagraph (b).

While in the parlance and practice of copyright law an article which appears in a periodical is in a general sense a book, this differentiation in Section 5 shows that there is a distinction in the eye of the law to be made in the proper case between a book as such and a newspaper as such. This distinction is carried out in Section 12 in connection with the matter of deposits, which provides that in the case of books the deposits shall be two complete copies of the best edition, and in the case of contributions to periodicals, the deposit shall constitute the periodical itself.

The Register must be the one to determine, in considering the sufficiency of the deposit from the standpoint of Section 12, whether it is a book or whether it is a periodical; but since Section 12 requires that a copy of a periodical shall constitute the appropriate deposit where the claim of registration of copyright is sought to cover a contribution to a newspaper, the Register must also determine whether the purpose to be served by the writing is intended to take the form of a contribution to a newspaper. This becomes of great importance in connection with the matter of fees.

A fee of \$2.00 is required for a contribution to a periodical. Let us say that three separate applications are made for three separate contributions to a newspaper accompanied by three separate copies of the newspaper in which these contributions appeared; the sum of \$6.00 is sent in by way of fees required by the Act, and registration is promptly made. But let us say that these three copies of the three newspapers are stapled together and put between paper covers and application for registration is made of this material as a book accompanied by two bound copies and a single application for it as a book and the fee of \$2.00. It seems plain that the Register would not only have the discretion but the duty to decide that this was not a "book" as the term is used in the Act; for to accept this material as a book and require only a fee of \$2.00 would be obviously to defeat the purpose of the Act in two ways: (1) with respect to the deposit required in the case of contributions to newspapers and (2) to defeat the purpose of the Act with respect to the requirement of the amount of fees in the case of each contribution; for if he accepted the application he would be accepting \$2.00 instead of \$6.00 to which the Government is entitled.

A reference to the comments of the courts as to the interpretation of the Act by the Register will show that the court has regarded with perfect equanimity the expression of the views of the Register with respect to what shall constitute a book under the Act.

If the above reasoning is correct and the Register is not under the obligation of regarding a compilation of three newspapers containing three separate contributions thereto as a book rather than as being what they really are within the meaning of Section 12--separate contributions, for each one of which a fee of \$2.00 is required by the Act--it would seem, to say the least, that his discretion in the matter of registration would extend to the case of the page proof of material obviously intended for publication in newspapers.

For if the finished product in the form of three newspapers containing three separate contributions can be held by him not to constitute a book—not to change its nature from contributions to a book—it would seem necessarily to follow that this metamorphosis cannot be effected where the material takes the form of page proof.

A court of equity has power under certain circumstances to restrain a public officer or official agency from the commission of a contemplated illegal act. The question is whether the circumstances of the present case bring it within the rule stated in the cases cited.

The general rule is that the judicial power will not be interposed, either by mandamus or injunction, to limit or direct the action of public executive officers in respect to pending matters within their jurisdiction and control. "Interference in such a case would be to interfere with the ordinary functions of government." Louisiana v. McAdoo, 234 U. S. 627, 633; and see National Life Ins. Co. v. National Life Ins. Co., 209 U. S. 317, 325. Such interference by the courts "with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." U.S. ex rel. Ness v. Fisher, 223 U. S. 683, 693. It was never intended that the courts should displace the judgments of administrative officers or bodies in matters properly within their jurisdiction. Waite v. Macy, 246 U.S. 606, 608; Plested v. Abbey, 228 U.S. 42; U.S. ex rel. Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324-25.

It is only in clear cases of illegality of action, therefore, that the courts will intervene (Bates & Guild Co. v. Payne, 194 U.S. 106, 108-09; National Life Ins. Co. v. National Life Ins. Co., supra; Masses Pub. Co. v. Patten, 2 Cir., 245 F. 102, 106) to displace the judgments of administrative officers or bodies. Waite v. Macy, supra. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, 272 U. S. 1, 14-15. The presumption to validity attends legislative and other official action, and the burden of proof to the contrary is upon one who challenges the action.

OFFICE OF THE
REGISTER OF COPYRIGHTS

RCD-DEW

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WASHINGTON

May 11, 1933.

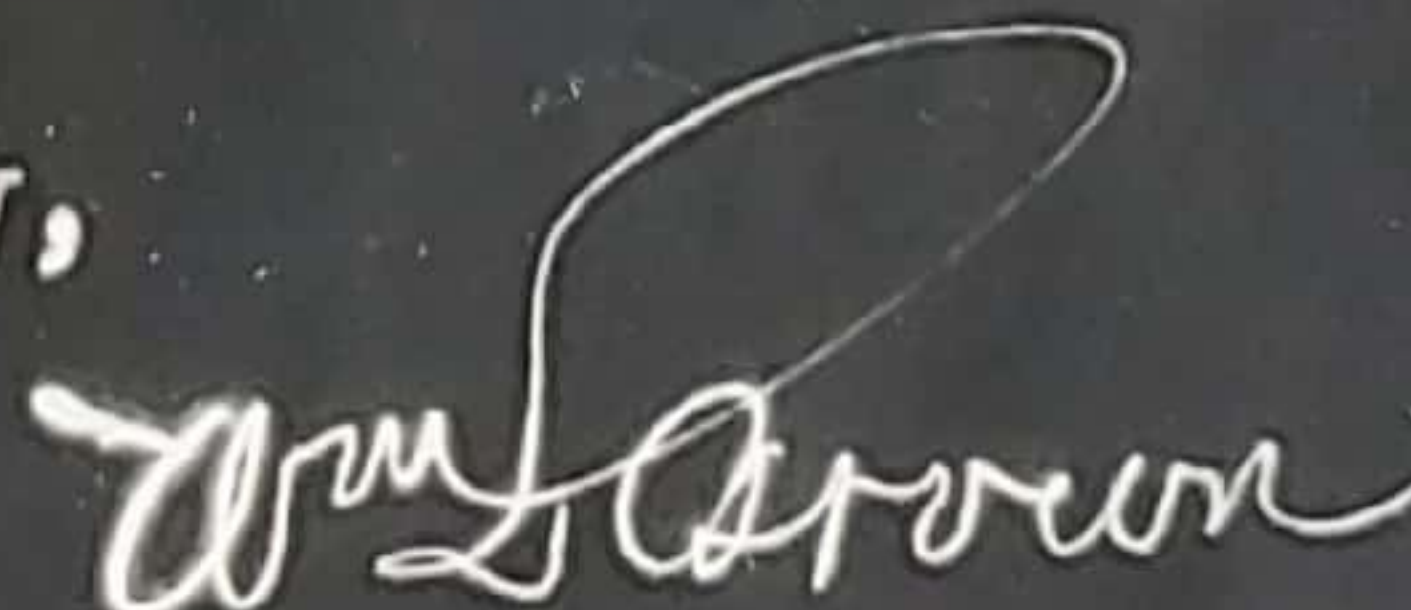
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6-7-40
RWP

Dear Sirs:

The Copyright Office has received from you applications on behalf of the King Features Syndicate for three considerable collections of material, - "King Features Weekly" with twenty-eight contributions by different authors, "King Features Illustrated Weekly" with twenty-five different articles, and "King Features Comic Weekly" with fifty articles. These are for various release dates from May 6 to May 28. Apparently, the intention in depositing these groups of miscellaneous material is to secure a single registration at one fee for each general group. The Office is seriously in doubt, however, of its authority to make these registrations, both because of the question of fees, for which the Register of Copyrights is responsible under his bond, and because of the difficulty of satisfactorily identifying the material under the mere general titles adopted.

If you wish to submit a statement to indicate the provisions of the copyright law under which you believe authority may be found for registering in the manner requested, it will of course receive due consideration; but obviously there must be some limit to the quantity of material which the Office can accept between covers as a single book. It may further be suggested that the whole procedure of registering syndicate matter in advance of its appearance in newspapers is of doubtful authority. Although acquiesced in by the Office upon the insistence of the publishers of such material for some time past, it is hardly consistent with the express provisions of the law for the registration of contributions to periodicals.

Respectfully,



Acting Register of Copyrights.

Messrs. Mock & Blum,
10 East 40th Street,
New York, N. Y.

OFFICE OF THE
REGISTER OF COPYRIGHTS

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COPYRIGHT OFFICE
WASHINGTON

*Depts 23 Id.
6-7-44
RWY*

RCD:JCB

June 1, 1935

Gentlemen:

The Copyright Office received some time ago your letter of May 12, citing authorities in support of the applications filed by you on behalf of King Features Syndicate for registrations of collections of materials prepared by them for publication in newspapers. Since that time your representative, Mr. Bond, has called personally and conferred upon the matter with the Register of Copyrights. As a result of that conference, it was agreed that the present registrations might be made, but not as a precedent for future registrations covering like quantities of material on a single application. As to your citations of authorities, with which the Office is familiar, it may be sufficient to say that it is not believed that any of them would justify the registration on one application and fee of an indefinite amount of material simply put together for the purpose of securing such registration. Obviously there must be some limit as to what can be done in this way; otherwise, a publisher of books might include his entire output for a year on one application, or the publisher of pictorial material might do likewise. The copyright statute is to be read with a reasonable regard to the interpretation of its terms, and the word "book" must be taken, as a rule, in its normal meaning. There is at the present time a marked tendency on the part of applicants to strain the provisions of the Copyright Act to an extreme limit in the endeavor to save fees. The Office feels obliged to withstand such endeavors where they appear to go beyond what the law reasonably permits. You will realize, we are sure, that this is done in the execution of what we believe to be a plain official duty.

Respectfully,

Messrs. Mock & Blum
10 East 40th Street
New York City

Wm. L. Brown
Acting Register of Copyrights ✓
D

OFFICE OF THE
REGISTER OF COPYRIGHTS

WLB
KGC

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
WASHINGTON

June 7, 1933.

*Refto. 348d
6-7-40
RWP*

Gentlemen:

Referring again to the subject of our recent correspondence, Mr. Bond has conveyed to me by telephone your request that I tell you how many daily features you may properly combine in one copyright entry. But this I cannot properly do for two reasons, first, because you would then be warranted in assuming that such entries secured adequate copyright protection for these features, and that assurance I cannot give; secondly, because I am not sufficiently familiar with the number and variety of your releases.

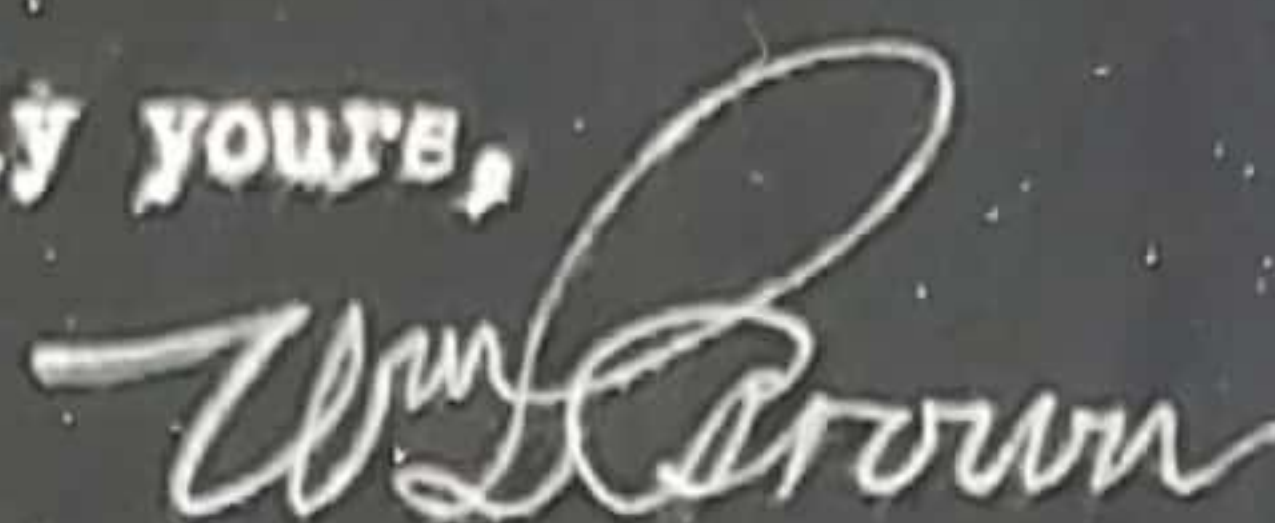
I can only repeat what I have said before, that if you choose to make application for a number of releases, as you have been doing, we will make the entries provided there is not an unreasonably large number of separate items included in one application. For example, we received from you some weeks ago a volume (an inch or more in thickness) made up of fifty or more issues-- if you had sub-divided these into four or five parts, the Office would probably have accepted one application for each such part, without question. Or again you have asked if weekly registrations will be satisfactory? In this connection we would observe that many publishers combine the daily issues of a given title ^{for one week} in one application and the entries are readily made. If, however, they were to put together the daily numbers of one title for three months, the Office would feel obliged to protest that this is going too far, because the Office is responsible to the United States Treasury for copyright fees.

WLB
KGO

Messrs. Mock & Blum-2.
June 7, 1933.

And so you see that with the best will in the world we cannot arbitrarily dictate your action in this matter. It must needs be your problem and this Office will give fair consideration to your applications.

Respectfully yours,



Acting Register of Copyrights.

Messrs. Mock & Blum,
10 East 40th Street,
27th floor,
New York, N.Y.

OFFICE OF THE
REGISTER OF COPYRIGHTS

CLB:GC
SLB 35, p. 193
FI

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WASHINGTON

1 Dept 950d
6-740
MAR 1 1938
February 26, 1938.

Attention: Alfred H. Wasserstrom, Esq.
SLBK 34 P 263

Dear Mr. Wasserstrom:

Receipt is acknowledged of your letter of February 23, 1938, re your application for registration of material contained in the following volumes:

King Features Illustrated Weekly Volume I
King Features Illustrated Weekly Volume II
King Features Illustrated Weekly Volume III
King Features Illustrated Weekly Volume IV
King Features Illustrated Weekly Volume V

This material seems to be identical in nature with the material entitled "King Features Illustrated Weekly Volume I," application for registration of which was made last year and refused by this office.

Your letter seems to be devoted exclusively to pointing out the fact that publication of this material in the form in which it is deposited in this office has taken place. This point was also urged with respect to the material identical in nature for which registration was refused last year. In this connection, permit me to quote from my letter to you of January 22, 1937.

"It is not perceived how the conditions under which King Features sold these proofs, or Mr. Kletter bought or sold them, are relevant to the question of their registration.

"The material which you submit for registration appears to be a bound collection of a large number of proofs of cartoons commonly known as newspaper comic strips, such as appear in the daily press and which, in their essence, constitute now, and have for years past been regarded as constituting, contributions to such newspapers. The deposit required by the Copyright Act in the case of material of this kind is 'one copy of the issue or issues containing such contribution' (Section 12)."

I also quote from my letter of February 4, 1937, with which you are doubtless familiar, addressed to your representatives in Washington, Messrs. Mawhinney & Mawhinney:

"(1) Can material created for one purpose only, used in the past for that purpose and to be used in the future for that purpose, to wit, sale and distribution to the public in the

form of contributions to newspapers, change its nature as such material as the outcome of the process of causing separate proofs thereof to be assembled, bound between covers, and the result labeled a 'book'?

"(2) Can the requirement of Section 12 of the Copyright Act that in the case of contributions to periodicals there shall be deposited with the Copyright Office 'one copy of the issue or issues containing such contributions' be avoided by collecting 135 proofs of such contemplated contributions, binding them together, and offering the result to the Copyright Office as a substitute for the type of deposit specifically described as essential in the Section in question?

"(3) Can the requirement of Section 61 of the Copyright Act that a fee of \$2.00 is payable for the registration of 'any work subject to copyright' except certain material which does not include contributions to periodicals, be avoided by assembling the proofs of 135 'works subject to copyright,' each one of which bears a copyright notice, and submitting them to this Office for registration with a check of \$2.00 instead of \$270.00?"

Aside from the assertions contained in your letter of the 23rd with respect to the publication of the material involved, you state inter alia: "We submit the Register is without authority to pass upon the question of whether copyright has been secured in and to a work."

The Register does not purport to exercise any such power in connection with action taken upon the registration of this material. You further state: "The Register has neither the power nor the machinery for the investigation of the validity of claims to copyright."

The validity of the claim of copyright to the material submitted for registration has not been and is not raised by the Register in connection with this application for registration.

I have no hesitation in asserting, however, that it is not only the power but the duty of the Register to make registration under the conditions, and under such conditions only, prescribed by the statute. Those conditions are set out in Sections 10 and 54 of the Copyright Act which I quote as follows:

"Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this

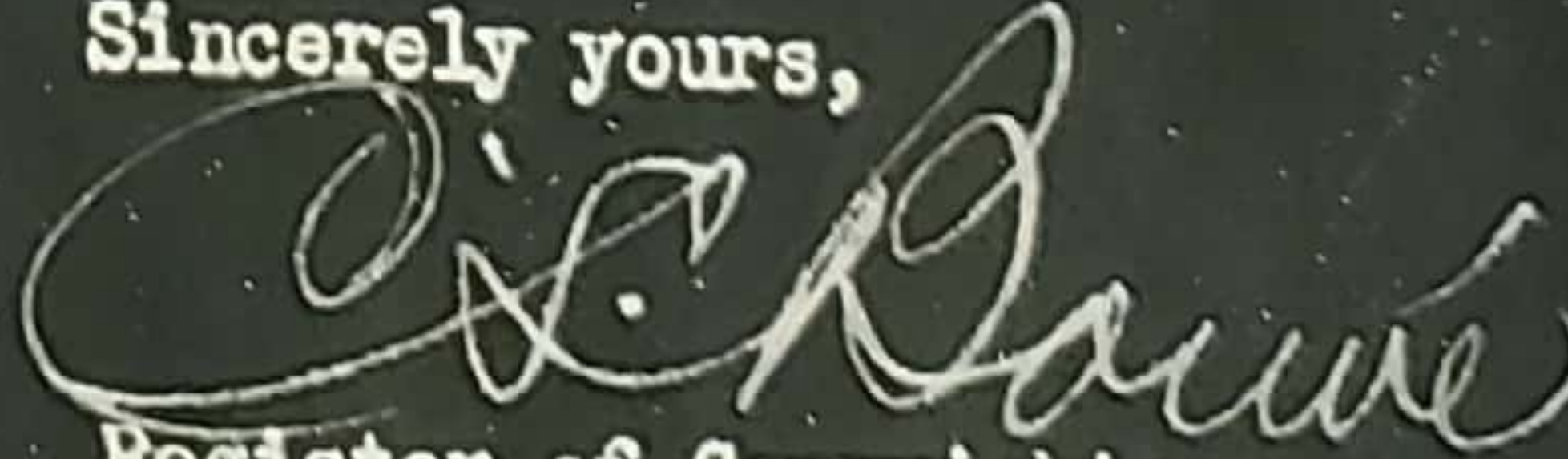
Mr. Wasserstrom informed me on the occasion of our last conference in this office, that the publication of this material in the newspapers took place within a week following the so-called publication thereof in the form in which it is deposited here on these applications for registration. This fact is established by the contents of this material, by the item entitled "This Day in History" which covers separate events occurring on separate dates running May 9, 10, 11, 12, 13 and 14; as well as in the articles by Clark Kinnaird covering, in like manner, the dates May 10 to 15, inclusive.

To judge from its appearance, this material is simply preliminary copy which is sent by the King Features Syndicate to their various newspaper connections for publication in the press. It may be this act which was described as publication in the application for registration. If this is the case, I would entertain grave doubts as to such act constituting the publication expressed by the statute. But admitting arguendo that such an act did constitute publication, I must again emphasize the fact that the securing of copyright by publication, or the failure thus to secure it, is a question entirely apart and distinct from the duties of the Register with respect to the acceptance of material deposited in connection with the registration of claim of copyright.

Undoubtedly many of these articles have already appeared in the daily press. Doubtless the rest of this collection of 116 articles will have appeared in the press within a few days.

If your client will file with the Copyright Office one copy of the issue or issues of the newspapers in which these contributions, when published, appear, registration will be promptly made. Until such time, registration must be, and is, denied because of the failure of the King Features Syndicate to meet those conditions of registration the existence of which is essential to the performance of my duties regarding registration as those duties seem clearly set out to me in the terms of the statute.

Sincerely yours,


Register of Copyrights

Manheim Rosenzweig, Esq.,
959 Eighth Avenue,
New York, New York.

OFFICE OF THE
REGISTER OF COPYRIGHTS

CLB:GC

5-12-38

SLB 35, p. 296

FO

LIBRARY OF CONGRESS

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WASHINGTON

Attention: Alfred H. Wasserstrom, Esq.

Dear Sir:

Receipt is acknowledged of your letters of May 2 and 7, 1938, enclosing applications for the registration of five volumes of "King Features Illustrated Weekly" for April and five volumes of the same title for May.

This material corresponds in all respects to the five volumes of the "King Features Illustrated Weekly," registration for which was requested in your letter to this office of February 23, 1938. In my letter of February 26, 1938, sent in reply to yours of February 23, 1938, you were informed that registration thereof could not, in the opinion of the office, be made, and the reasons setting out the grounds of this action were discussed in great detail in that letter. As pointed out in that communication, the action then taken was confirmatory of and consistent with the action taken by this office in 1937 in connection with your application for the registration of material entitled "King Features Illustrated Weekly, Volume 1."

For the reasons brought to your attention by this office, both in the course of correspondence and of conferences held in this office in 1937, and in my letter to you of February 26, and with which, consequently, you are fully familiar, registration of this material must again be denied. However, I find enclosed with your letter of May 7 not only five applications for material of the type above described, but an application form A-7 requesting the registration of what you designate as a book and entitle "King Features Weekly," and further describe in the application as a "composite work." Two copies of this material are enclosed as deposits to support this A-7 application. This compilation of material has been carefully examined and found to contain the following writings by well-known newspaper columnists:

<u>Author</u>	<u>No. of Articles</u>	<u>Title</u>
Arthur "Bugs" Baer	1	"Biographies of a Bug"
" " "	6	"One Word Led to Another"
Jo Paquin	6	"What's the Answer?"
Helen Rowland	2	"The Marry-go-round"
Axel Storm	1	"Broadway Nights"
Edwin C. Hill	6	"The Human Side of the News"
Mrs. Cornelius Beeckman	7	"Good Manners"
Helen Jameson	7	"Beauty"
Alice Alden	3	"Fashion Flashes"
No author	1	"This Day in History"
Beatrice Fairfax	4	"Advice to the Lovelorn"

<u>Author</u>	<u>No. of Articles</u>	<u>Title</u>
Elsie Robinson	5	"Listen, World"
" "	1	(title and 1st page missing)
Sabina Connelly	6	"What Do you Know?"
Alice Hughes	7	"A Woman's New York"
Ida Jean Kain	6	"Your Figure, Madame"
Dan Parker	3	"I'm Telling You"
Not given	6	"Clem McCarthy at the Races"
Erskine Johnson	7	"Behind the Make-up"
Frances Drake	7	"Your Individual Horoscope"
Dr. Herman N. Bundesen	6	"Dr. Bundesen's Daily Health Column"
Alma Archer	1	"New-Fangled Marriage"
" "	1	"A One-Way Ticket to a Wheel Chair"
" "	1	"Sex Appeal on the Payroll"
" "	1	"How to be a Bride"
" "	1	"Bathtubs for Job Hunts"
" "	1	"A Lot of Horse"
" "	1	"Sun Spots for Summer"
Clark Kinnaird	5	"Today is the Day"
Jack Cluett	6	"Don't be Too Sure"
	<u>116</u>	

In this entire collection as they are bound together there are 116 different articles, each one obviously intended to serve its true function as a contribution to a newspaper. In the articles entitled "Dr. Bundesen's Daily Health Column" there are to be found instructions as to the type to be used at certain points when the article is made available to the public in the newspaper in which it is to appear or has already appeared. This is repeated in the articles by Ida Jean Kain; as examples, "Black Face"; "End Black Face"; "(1 col. caption)." Also in "Listen, World" by Elsie Robinson: "(Begin Italics)"; "(End Italics)"; "(Pick up or reset the following standing box)"; "(No Space)".

The form in which this collection appears is not page proof, as is the case with the other "King Features Illustrated Weekly" collections characterized by a volume number; for the material in question appears to be mimeographed or other similar process.

As has so many times been brought to your attention in the course of conferences and communications on this subject, registration cannot be effected by the Register of Copyrights unless the applicant for registration has complied with the provisions of the Act. As stated in the Report to accompany H.R. 28192,

"Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the register of copyrights can issue to the claimant a certificate of registration."

What you are sending for registration is a selected assortment of separate articles written for the sole purpose of fulfilling their function of being made available to the public by publication as contributions to newspapers. Contributions to newspapers are, in a general sense, under the Copyright Act books and, as published books, the registration fee is set, under Section 61, at \$2.00.

Section 12 of the Copyright Act draws a sharp distinction, for the purposes of the nature of the deposit to be made in the Copyright Office, between books and contributions to newspapers for which special registration is requested. Each one of the 116 separate articles, fastened together and sent to the Copyright Office with the request that they be registered as a composite work, has a separate and distinct copyright notice; this obviously because of the purpose to publish each one of these separate contributions separately in a given issue of a newspaper or newspapers and to protect it as such separate publication by a separate copyright notice without which copyright protection could not exist. In view of the provisions of Section 12 of the Act, the publication of such separate contribution with such special copyright notice is tantamount to information to the public that special registration has been requested. To file an application for registration of a contribution to a newspaper after publication with such copyright notice constitutes a request for special registration within the meaning of that language as used in Section 12 read in connection with the requirements of that Section as to the nature of the deposit which must support the application. Section 12 specifically requires that a copy of the newspaper in which a given contribution is published is the form of deposit, and the only form which will justify registration.

Your application for the registration of this material must be denied for the following reasons:

You make application for this assembled material under the name of a "composite work." Where the law requires a deposit of a certain type for material of a certain type, such as this—contributions to newspapers—and requires that a separate fee shall be provided for each such writing, I must confess myself unable to see how these specific provisions can be avoided by the simple process of collecting together a number of separate articles really intended to be made available to the public generally for the first time as separate publications.

As I understand the situation, you are requesting me, as Register of Copyrights, to register 116 different writings for \$2.00 instead of requiring what the law certainly, it seems to me, imperatively requires before registration, to wit, a fee of \$232.

You are requesting me to accept as a deposit in connection with the application for registration of copyright in this material, a deposit which I have no authority to accept, as I read the law.

For purposes of classification under the Copyright Act, a contribution to a newspaper is regarded as a book and registration thereof calls for the payment of the sum of \$2.00 by way of statutory fee.

See Aug 10

The material for the registration of which you apply consists of paper-bound volumes each containing a certain number of cartoons or comic strips in page proof. Many of these comic strips are well known to the public of the United States, as well as to the public beyond its borders, by virtue of their constant appearance in the public press. Were the normal course of registration—that course specifically laid down in Section 12—to be followed, an application for registration of one or more of these contributions would be accompanied by the deposit of the issue or issues of the newspaper in which it appeared, accompanied by the fee of \$2.00 for each registration. But that is not the course which is followed here. Your client seeks what, in my opinion, is a course not prescribed by the Act and which runs directly counter to the provisions of Section 12, which I have quoted. He causes between one hundred and two hundred page proof productions of separate contributions to be assembled in one volume, sends them thus assembled to the Copyright Office and requests that they be registered for the sum of \$2.00. In a word, I am requested to register for \$2.00 material for which, by a specific provision of the Act, I am directed to accept as many times \$2.00 as there are separate newspaper contributions in the particular volume. I feel that I cannot do that without ignoring the instructions of Congress as revealed in the Act.

But your client contends that this material assembled together and bound in paper covers constitutes a book—a single publication. He points out that the book thus constructed has been placed on sale and sold to the public; that to that volume is attached the adequate copyright notice, and that the deposit of two copies of this volume, together with an application for its registration as a book correctly filled out as to books and accompanied by a fee of \$2.00, makes it obligatory upon the Register to register the same. In other words, he seeks to avoid the requirements of Section 12 and Section 51 by a process which to my mind the statute does not mean shall be employed and with results which, if registration were made, the framers of the Act certainly did not have in mind. For I cannot believe that Congress, in providing that there should be paid into the Copyright Office a fee of \$2.00 for the registration of, and issuance of certificate of registration in connection with, a contribution to a newspaper, meant that the payment of such fees could be avoided by the employment of an obvious expedient: no matter how acceptable from the standpoint of the applicant. It follows that I do not feel myself in a position to make such registration, application for which is accompanied by a fee of \$2.00 only; for in my opinion, the law requires that the Government of the United States, through the Copyright Office, shall receive a far greater amount.

I understood from you this morning in conversation that the contents of this material appear in the newspapers for publication for which they are prepared within a week of the date on which such material is sold to the public in the form of collections of page proof bound in a separate

volume. Such publication constitutes a daily manifestation to the public of the United States of the fulfillment of the true function of this page proof material; and its prompt appearance in the newspapers is the best evidence of the basic purpose it is to serve. I have no doubt that you will agree with me that the production of this material in this form is accomplished for the sole purpose of facilitating its reproduction in the newspapers in which these comic strips appear; in other words, that this page proof material constitutes in this case, as does any other page proof, an intermediate step in the production of newspaper-making or bookmaking. But Section 12, by necessary implication as well as by direct terms, reflects the intention of Congress that the form in which deposits of material such as this is to be accepted by the Copyright Office, is a form which, taking into consideration the method of publication, shall be complete, that is, shall be in the form of the actual newspaper itself when made available to the public. To collect these page proofs and bind them in a paper cover cannot, in my opinion, change their inherent nature--stop them from being what they are and what they are intended to be, to wit, contributions to periodicals. In my opinion, I cannot accept them as deposits for registration for the simple reason that in Section 12 Congress specifically provides that such deposits shall take a different form.

But let me accept, for the sake of argument, your contention that they constitute books and are not really contributions to periodicals because at the time you sent this material in the newspapers in which they appear have not been published. You state that they are acceptable as deposits as books because, you say, they are two complete copies of the best edition of the material contained therein; and the basis for contending that they are the best edition is predicated on the proposition that, being the only matter published, they must constitute the best edition of such matter published at the time of making application. The contention amounts to this: That when Congress provided in Section 12 of the Copyright Act that the deposits should consist of two complete copies of the best edition, this statement meant, in effect, that there should be acceptable as deposits two complete copies of page proof. It seems to me that this contention is untenable even were I to depend for my conclusion upon an interpretation of the phrase "two complete copies of the best edition" alone. But it is my duty, as I see it, to take into consideration not only Section 12, but Section 12 read in the light of other applicable provisions of the Act.

As you are well aware, the preceding Copyright Act required the deposit of two copies of the "copyright work" in order to enable the person seeking copyright to secure the copyright of a book. The present law has no such provision. Copyright is secured by the simple act of publication with the notice. Under the present Act the securing of copyright is one thing, registration of the claim of copyright another, and the performance of conditions precedent to registration is, once again, a thing separate and apart from each of the other two. In other words, there must be some reason for the insistence in the Act upon deposit in the form required by the Act under Section 12.

Those reasons are to be found in that provision of Section 13 which provides that in the case of refusal on the part of a person who has secured copyright to make the deposit required by the Act after demand is made upon him by the Register of Copyrights to do so, he shall pay a fine of \$100, lose his copyright and pay to the Librarian of Congress the retail price of two copies of the best edition of the work; and particularly in Section 59 of the Act. That Section reads as follows:

"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

If deposits made in page proof of a book are to be accepted by the Register of Copyrights by way of deposit, it is obvious that the function which those deposits are intended to fulfill as defined in Section 59 could not be exercised. Page proof, instead of complete copies of the best edition of the works of authors, would take the place of those complete copies of the best edition which, by virtue of the Copyright Act, day by day increase the volume of literary works in the permanent collections of the Library of Congress; the Librarian would find himself balked in an effort to "sell or exchange" page proof copies of material which by the time such sale or exchange was attempted, had long since made its appearance in marketable editions available to the public; the Government of the United States would be forced to buy for the Library of Congress in the public market such books as it was deemed necessary to acquire for the purpose of maintaining or adding to such permanent collections--and this in the face of the provision of Section 13, to which I have alluded above, the manifest purpose of which is to provide that the Library of Congress shall be enriched by "two complete copies of the best edition" without cost to the people of the United States.

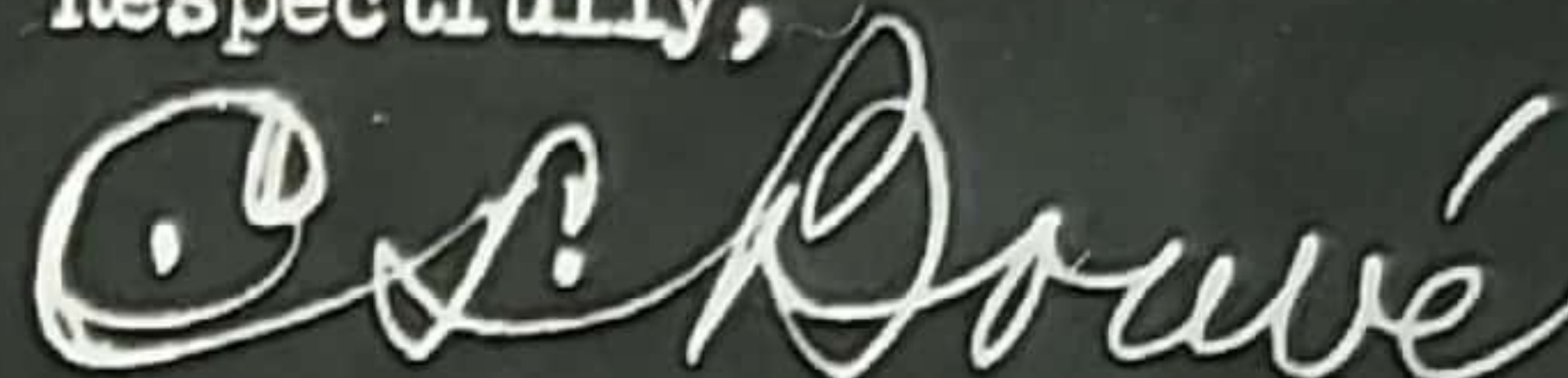
For the reason that, as I see it, the acceptance of page proof material of books as deposits instead of books themselves would run counter to the very purposes for which such deposits are demanded on pain of great embarrassment, if not the actual loss of the copyright to the copyright owner, I feel it my duty to refuse to accept deposits in the form of page proof material.

Let me again emphasize that my action in this case is taken without reference whatsoever to the question as to whether the material which you submit for registration has been published or whether you have secured a copyright therein. The sole questions involved in this case turn upon

my construction of what my powers and duties are in connection with the matter of registration of claims of copyright. That I must judge for myself. No member of the public can act for me in this respect.

As I interpret the Act and the facts surrounding this situation, the material, registration for which you request, constitutes in fact contributions to periodicals, and constitutes in fact and substance page proof of such contributions. If you see fit to file with the Copyright Office one copy of the issue or issues of the newspapers or periodicals in which these comic strips appear, accompanied by the fee specified by the Act, registration will be promptly made. I have written you in the above detail because your letter of February 23 seems to indicate that at the time it was written there was no mutual understanding between us as to the issues involved.

Respectfully,



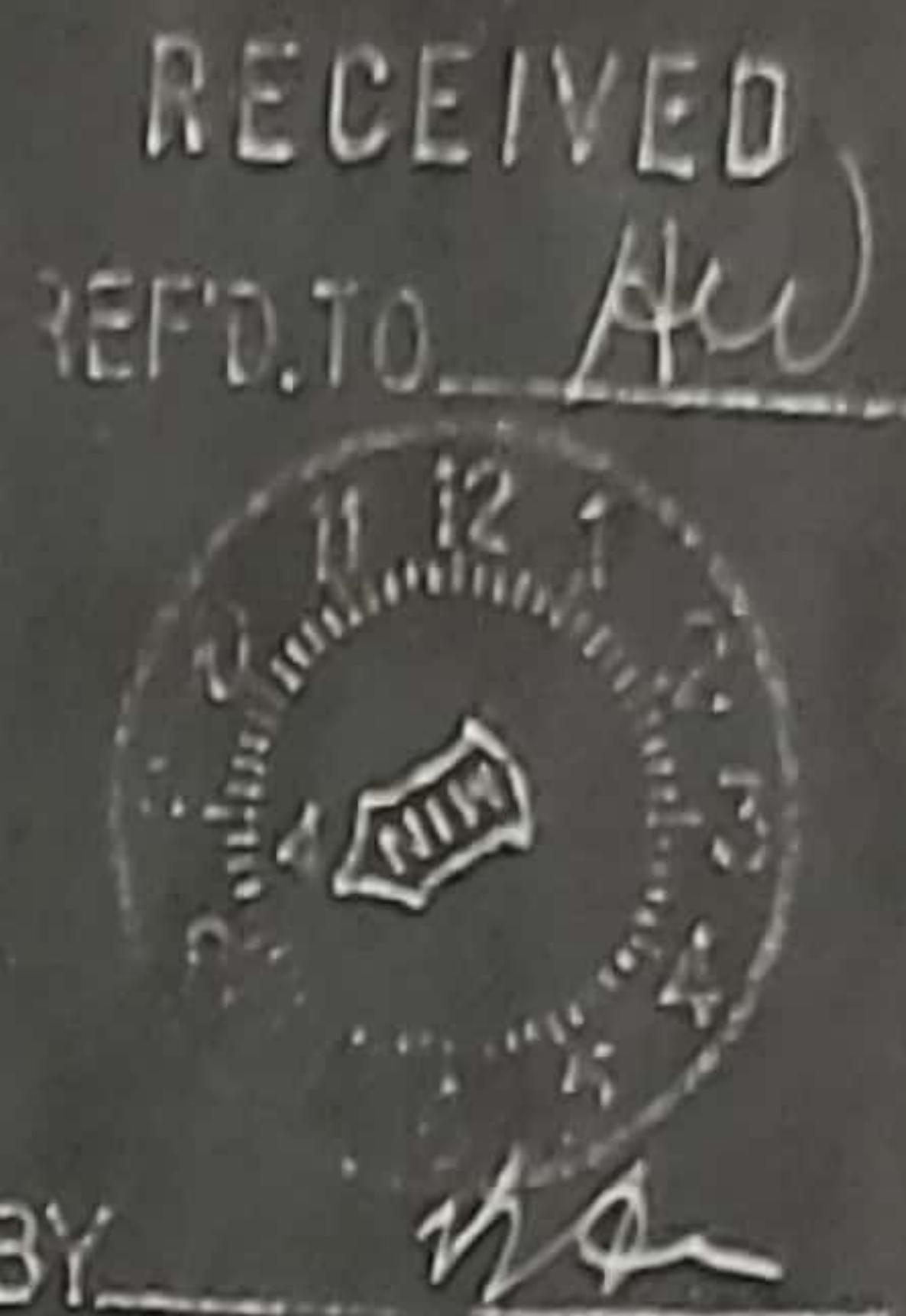
Register of Copyrights

Manheim Rosenzweig, Esq.,
Two Columbus Circle,
New York, New York.

P. S. On page 4 of this letter I have emphasized the fact that the contents of the volumes which you submit for registration contain proofs of comic strips. I do not mean to imply that that is all these volumes contain, for they constitute also a very material part of proofs of featured newspaper articles of widely varied description.

CLB:GC
5-27-38

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
WASHINGTON



Attention: Alfred H. Wasserstrom, Esq.

Dear Sir:

MAY 28 4 38 PM

Receipt is acknowledged of your letter of May 21 enclosing applications for copyright registration of the volumes entitled "King Features Illustrated Weekly," I, II, III, IV and V, first published May 19, 1938, together with application for registration of "King Features Weekly" first published May 19, 1938. Receipt of the material is also acknowledged.

These applications are rejected for the reasons set out in my letters to you of January 22, February 26, and May 12, 1938.

I cannot see the application of the statement on page three of your letter: "Your right to make rules and regulations with the approval of the Librarian 'does not confer upon the Register any judicial functions.'"

There is no question involved in the issue between us as to the right of the Register to make rules and regulations. I am acting in accordance with my interpretation of Section 10 of the Act which House of Representatives Report 2222 to accompany H.R. 28192, cited in your letter, interprets in the following language:

"Section 10 explains the method of obtaining registration of a claim to copyright and what must be done before the Register of Copyrights can issue to the claimant a certificate of registration." (p. 10)

You state that you realize the issue obtaining between us. To my mind, that issue is clear cut and is expressed in the four following propositions:

(1) I cannot accept page proof because, for the reasons set out in such detail to you in prior correspondence, page proof material of a writing does not constitute the best edition thereof.

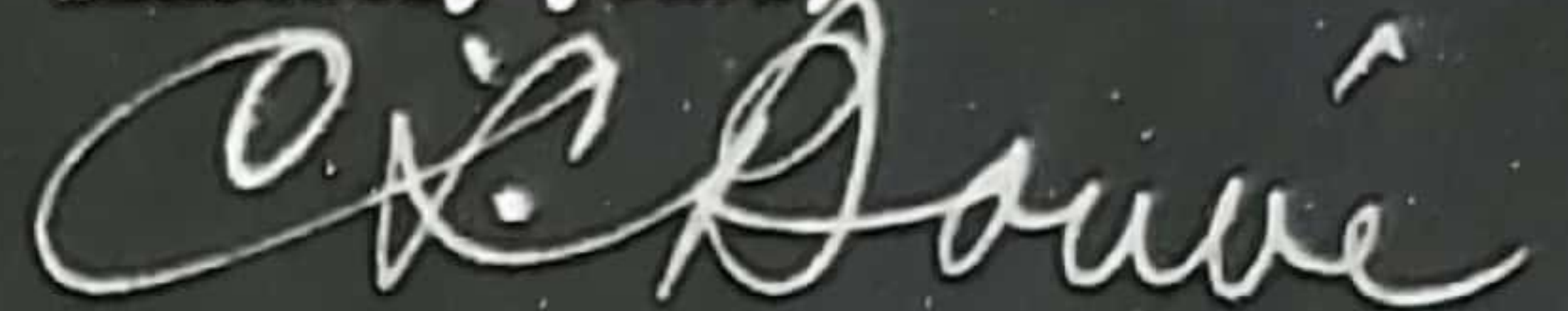
(2) I cannot register more than one claim to copyright for the fee which the law provides shall be paid for one such claim only.

(3) I cannot accept by way of deposit and, consequently, cannot register material which constitutes contributions to periodicals except on the receipt of the deposit which Section 12 provides shall be made when registration for such contributions is requested.

(4) The mere assembling of page proof of contributions to newspapers, and applying for registration thereof as a book, cannot make such an accumulation of material a book for the purposes of the deposit required by Section 12 of the Act.

If you will turn to pages 58 and 59 of 226 U. S., you will find, I believe, more than ample authority to support the proposition in paragraph 4 supra.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "C. C. Davis".

Register of Copyrights

Manheim Rosenzweig, Esq.,
959 Eighth Avenue,
New York, New York.

COPY

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
WASHINGTON

February 4, 1937.

*Def to 3821.
6-7-40
RUP*

CLB:GC
SLBK 34, p. 198,

Gentlemen:

Receipt is acknowledged of your undated letter in re. application of "King Features Illustrated Weekly, Volume 1" dated January 12, 1937, which was written in reply to my letter to you of January 22, 1937.

The issue involved in this case is not whether there exists in the Copyright Act any provision which would require the separate copyright of pictures, cartoons, etc., published in book form which might afterwards be used serially. It is the following questions which are fundamental here:

- (1) Can material created for one purpose only, used in the past for that purpose and to be used in the future for that purpose, to wit, sale and distribution to the public in the form of contributions to newspapers, change its nature as such material as the outcome of the process of causing separate proofs thereof to be assembled, bound between covers, and the result labeled a "book"?
- (2) Can the requirement of Section 12 of the Copyright Act that in the case of contributions to periodicals there shall be deposited with the Copyright Office "one copy of the issue or issues containing such contributions" be avoided by collecting 135 proofs of such contemplated contributions, binding them together, and offering the result to the Copyright Office as a substitute for the type of deposit specifically described as essential in the Section in question?
- (3) Can the requirement of Section 61 of the Copyright Act that a fee of \$2.00 is payable for the registration of "any work subject to copyright" except certain material which does not include contributions to periodicals, be avoided by assembling the proofs of 135 "works subject to copyright," each one of which bears a copyright notice, and submitting them to this Office for registration with a check of \$2.00 instead of \$270.00?

You close your letter with the statement

"Since the Copyright Office has agreed with the bonafides of the publication of the book here offered for copyright, it would appear that there should be no valid objection to the issuance of a copyright certificate in this case."

February 4, 1937.

I cannot understand this statement, for my letter of the 22nd of January contains no comment with respect to the bona fides of any publication.

You are doubtless familiar with the provisions of Section 10 of the Copyright Act which makes compliance with the provisions of the Act, including the deposit of copies, a condition precedent to the registration of a claim of copyright and the issuance of the certificate which you request.

As I understand the facts and law in this case, I feel I have no power to take the action which you request; for my view is that to do so would be to run counter to specific provisions of the law and to the intention of Congress.

I shall, however, be glad to be favored with your views, either in writing or in conference on the issues raised by the submission of this material for registration. Will you let me know your wishes in this respect at your early convenience?

Respectfully,

(Sgd) C.L. Bouve

C. L. Bouve
Register of Copyrights

Messrs. Mawhinney & Mawhinney,
444 Munsey Building,
Washington, D. C.

CC MR. DONALD

May 21st, 1938

Register of Copyrights,
Copyright Office,
Library of Congress,
Washington, D. C.

Re: S L B 35 P 296

Dear Sir:-

We wish to acknowledge receipt of your letter dated May 12th, 1938 and pertaining to deposits and applications for copyright registration, made on behalf of our client, King Features Syndicate, Inc., with respect to weekly volumes entitled "King Features Illustrated Weekly" and volume entitled "King Features Weekly".

We have carefully noted the contents of your said letter. Unfortunately, we cannot accede to your position. It is our considered judgment, and we have urged this point many times in the past, both by means of letter and in conference, that in making the deposit referred to in your letter and in applying for copyright registration, likewise referred to in your letter, we have complied with the statutory requirements and are, therefore, entitled as a right to have our client's claims of copyright duly registered and certificates therefor duly issued.

Prior to the time of deposit and application for registration the works involved were duly published with

Ref'd to X Id.
6-7-40
RWT.

May 21st, 1938

copyright notice duly affixed as required by Section 9. Thereafter "two complete copies of the best edition" of the work "then published" were deposited in the mails properly addressed to your office, said copies being accompanied "in each case by a claim of copyright" in compliance with Section 12 of the statute.

At the time of said deposit the copies so deposited were not only the best edition of the work but the only edition of the work then published.

We submit, assuming that you are possessed of a field of administrative discretion in respect of the formulation of rules and regulations in respect of registration, that you have gone beyond the ambit of such discretion in refusing to accept such deposits.

We find nothing in the statute, and such administrative discretion as may be vested in you would be limited by the statute, authorizing you to pass upon the nature of deposits by going behind the applicant's characterizations or by applying the test of whether the material will at some future date be again published (republished) in an edition different from the one submitted and obtaining at the time of deposit. Your refusal, we submit, "is based upon a ground which under the statute" you, as Register, "may not consider". (Small v. Moss, New York Court of Appeals, decided April 12th, 1938. Opinion appearing in 99-113 New York Law Journal of May 16th, 1938)

We submit further that for you to decide whether

May 21st, 1938

or not the statute has been complied with in respect of submitted deposits would be tantamount to the exercise of a judicial function. Your right to make rules and regulations with the approval of the Librarian "does not confer upon the Register any judicial functions". (House of Representatives report #2222, to accompany H.R. 28192, page 20)

We realize the issue obtaining between us. Despite that, we consider it incumbent upon us in view of the recent decision of the Circuit Court of Appeals for the District of Columbia in the case of Pearson, Allen, et als, vs Washington Pub. Co., Inc. to continue to make deposits and apply for registration, promptly after publication, as we have in the past done.

We are, therefore, enclosing herewith applications for copyright registration of volumes entitled "King Features Illustrated Weekly" I, II, III, IV, V, first published May 19th, 1938, together with application for registration of King Features Weekly, first published May 19th, 1938.

You are authorized to charge the fees necessary to effect registration, as provided in Section 61 of the statute, to the Trust Fund Account of King Features Syndicate, Inc., the copyright claimant.

We are this day depositing in the mails, under separate cover, addressed to your office, two complete copies of

Register of Copyrights

-4-

May 21st, 1938

the best edition of the said works now published, pursuant to
Section 12 of the Statute.

Sincerely yours,

MANHEIM ROSENZWEIG

By

Alfred H. Wasserstrom

AHW:MF
Enclosure

*See
Ram*

Ref. & W. Ed
6-7-40
RWP

, May 13th, 1933.

Hon. Register of Copyrights,
Library of Congress,
Washington, D.C.

Dear Sir:-

Referring to Remittance No. Class A-120452-54,
and in response to your letter of May 11, 1933, we submit
as follows:-

The statute specifically provides for copy-
righting a composite work and it also provides that a copy-
right shall protect all the copyrightable component parts of
the work (U. S. Code Title 17, Sec. 3).

In the case of

King Features Syndicate v. Fleischer,
299 Fed. 533 (C.C.A. 2d),

the plaintiff had copyrighted certain cartoons and it was held
that this copyright extended to the individual figures of the
cartoons. The court specifically cited the statute and it also
cited the following cases:-

Da Prato v. Giuliani Co.,
189 Fed. 90

Mail & Express Co. v. Life Co.,
192 Fed. 899.

In the "Da Prato" case, the plaintiff was a man-
ufacturer of religious statuary and it had copyrighted a catal-
ogue which contained various pictures and cuts of its articles
of statuary. The court expressly held that this copyright in-
cluded each of the cuts or pictures in the catalogue (189 Fed.
on p. 93). It is therefore not necessary for a manufacturer
to individually copyright several hundred cuts or pictures,
because the manufacturer can first publish said cuts or pic-
tures in the form of a single catalogue and pay a single fee.

In the case of

Mail & Express Co. v. Life Co.,

above cited, Life Publishing Co. had published a weekly

, May 12th, 1933.

-2-

Hon. Register of Copyrights.

Cardinal Film Corp. v. Beck,
248 Fed. 368;

Stern v. Remick,
175 Fed. 282.)

If an author writes short stories, he can separately publish and copyright the same, or he can publish any number of such short stories in a book, and secure a copyright by paying a single fee.

It seems to us that the Hon. Register of Copyrights is not responsible under his bond, as long as he merely issues a single certificate for a single fee. The publisher is satisfied to take the responsibility of first publishing the material in the form which has been submitted.

Since the publisher of an atlas can include thousands of maps in a single book, if the publisher so desires, and since the publisher of an encyclopedia or other composite work can copyright a tremendous amount of material by paying a single fee, we submit that there is nothing improper in the procedure which has been adopted.

Respectfully submitted,

B:L

Reffs & V. 8d
6-7-40
RWP

May 2nd, 1938

Copyright Office,
Library of Congress,
Washington, D. C.

Dear Sirs:-

We have this day, under separate cover, addressed to your office and deposited in the mails, two copies of the best edition now published of copyrighted works entitled -- King Features Illustrated Weekly- Volumes I, II, III, IV and V, together with two copies of the best edition now published of King Features Weekly.

We enclose herewith applications for registration of copyrights in and to the said books. This is on behalf of our client King Features Syndicate, Inc.

This is your authority to charge the statutory fees necessary to effect registration of the claims to copyright on behalf of King Features Syndicate, Inc. to the Trust Fund Account of King Features Syndicate, Inc.

Will you be good enough to acknowledge receipt of the said deposits, and of the enclosed applications.

Very truly yours,
MANHEIM ROSENZWIG,

By

Alfred H. Wasserstrom

AHW-HJH
encs.

[Handwritten signature]

Ref & U.-Id
6-7-40
RWD

May 7th, 1938

Copyright Office,
Library of Congress,
Washington, D. C.

Gentlemen:-

We have this day, under separate cover, addressed to your office and deposited in the mails, two copies of the best edition now published of copyrighted works entitled King Features Illustrated Weekly Volumes I, II, III, IV and V, together with two copies of the best edition now published of King Features Weekly.

We enclose herewith applications for registration of copyrights in and to the said books. This is on behalf of our client, King Features Syndicate, Inc.

This is your authority to charge the statutory fees necessary to effect registration of the claims to copyright on behalf of King Features Syndicate, Inc. to the Trust Fund Account of King Features Syndicate, Inc.

Will you be good enough to acknowledge receipt of the said deposits, and of the enclosed applications.

Very truly yours,
MANHEIM ROSENZWEIG
By
Alfred H. Wasserstrom

AHW:MF
Enclosures

[Handwritten signature]

Ref. & T 9d
6-7-40
RWR

February 23rd, 1938

C. L. Bouve, Esq.,
Register of Copyrights,
Library of Congress,
Washington, D. C.

Re: SLBK 34 P 263

Dear Colonel Bouve:-

We have, on behalf of our client, King Features Syndicate, Inc., deposited in the mails, on the 21st day of February, 1938, addressed to the Register of Copyrights, Library of Congress, Washington, D. C., two copies of the best edition then published of each of the following volumes:-

King Features Illustrated Weekly Volume I
King Features Illustrated Weekly Volume II
King Features Illustrated Weekly Volume III
King Features Illustrated Weekly Volume IV
King Features Illustrated Weekly Volume V

In each case, claim of copyright, on behalf of King Features Syndicate, Inc. as copyright claimant, in the form of an application for registration of the copyrights in and to the said books, accompanied the deposit.

You are hereby authorized to draw against the monetary deposit of King Features Syndicate Inc. to cover statutory fees for the entry of its claims to copyright and for the certificates of registration thereof.

We hereby request that the said applications be honored by your office, pursuant to Section 10 of the statute

February 23rd, 1938

(17 U. S. C. A. 10), and that certificates of copyright registration for the foregoing be issued in the name of King Features Syndicate, Inc., pursuant to Section 55 of the said statute (17 U. S. C. A. 55).

On the 17th day of February, 1938 two copies of each of the said volumes were sold under written contracts, without restriction of any kind upon the purchasers' title, to each of two independent newsdealers maintaining their respective places of business in different parts of the United States, one in New York and the other in Pennsylvania. Photostatic copies of the said contracts of sale are annexed hereto and made a part hereof.

The said purchasers, under the said contracts, have exhibited, exposed and offered for resale each of the said copies at retail so that any member of the general reading public, desiring to purchase the same, may be able to do so.

The exhibition, exposure and offering for resale have taken place in one case on the 18th day of February, 1938 and on the 19th day of February, 1938 in the other. No publication of any of the copies of the said books or of the individual features forming component parts thereof has taken place prior to the afore-said sales of copies.

The said volumes, we submit, were first published on the 17th day of February, 1938, that is, the date when copies thereof were first sold. In any event, the features forming component parts of the said volumes, although individually and separately republished as contributions to newspapers, have not been so republished prior to the 21st day of February, 1938.

Statutory copyright, pursuant to section 9 of the statute (17 U. S. C. A. 9) may be secured "by any person entitled thereto", by publication of the work with proper notice of copyright affixed. There has never been any issue between us as to the propriety of the form of statutory notice of copyright affixed to the title page of each volume. Said notice duly conforms with the requirement of 17 U. S. C. A. 18, 19.

We submit, it is settled law that first publication, sufficient to initiate statutory copyright, obtains upon the unrestricted sale of a copy or copies of the work with respect to which copyright is claimed. (Stern v. Remick & Co. 175 Fed. 282; Mittenthal Inc. v. Irving Berlin, Inc. et al., 291 Fed. 714; Atlantic Monthly Co. v. Post Publishing Co., 27 Fed. (2) 556; Patterson v. Century Productions Inc. et als, 99 New York Law Journal 7 (decided by the Circuit Court of Appeals, Second Circuit, Dec. 6, 1937); Weil on Copyright, sections 304, 317 at pages 124 and 127 respectively; Amdur on Copyright & Practice, section 21 pages 369, et seq.)

In Stern case, supra, the court said at p. 283:

***publication occurs as soon as the work is
unrestrictedly made public in any way." (Underscoring mine)

In the Stern case, supra, there was but one sale of the copy, and then solely for the purpose of completing the copyright.

In the Mittenthal case, supra, the court said, referring to the Stern case, at page 715:

February 23rd, 1938

*****Stern v. Remick***** was rightly decided
because there had been a sale*****.

In Weil, supra, the learned author observes
at page 124:

***the 'public' may consist of one person.
An unrestricted sale of a single copy has
been held a publication sufficient to divest
common law copyright and to initiate statutory
copyright, even though made for copyright
purposes only. Hence a publication is not
measured by the size of the public to whom it
is made." (Underscoring mine)

Again, on page 127 Weil states the rule to be
"a single sale of a copy of a book is a publication. The public
offer of copies of a work for sale is a publication, even though
the attention of the public is not called to such offer or works."

There is no place in the law of copyright for
the question of "colorable" sales as distinguished from bona fide
sales. (Atlantic Monthly Co. v. Post Publishing Co., supra, p. 558)

Section 62 of the statute (17 U. S. C. A. 62)
defines "the date of publication" for a work reproduced for sale as
"the earliest date when copies of the first authorized edition were
placed on sale, sold or publicly distributed by the proprietor of
the copyright or under his authority*****".

The last mentioned definition, however, has been
held not to exhaust the means by which publication, in the statutory
copyright sense, may be effected, that is, that definition is not a
general one of what constitutes publication. (Cardinal Film Corp. v.

February 23rd, 1938

Beck, 248 Fed. 368; Patterson v. Century Productions, Inc. supra.)

We have referred above to the Stern case. We realize that that case was decided under the statute immediately prior to the extant one. So much of the decision thereof as supports the proposition that the sale of a single copy is a publication for copyright purposes, has been, however, adopted in respect of the interpretation of the concept of publication under the present statute. Moreover, the rule that "the sale of copies of the work is a general publication" has received recently the imprimatur of an appellate court in a case under the present statute (Patterson v. Century Productions, Inc. et als, supra).

Cases decided under prior copyright statutes in which the sale of a copy of the work, with the consent of the author or proprietor, has been held to constitute a publication are *Gottesberger v. Aldine Book Pub. Co.*, ^{33 Fed.} 381; *Osgood v. A. S. Aloe Instrument Co.*, 83 Fed. 470.

Theoretically, there can be no publication sufficient to initiate statutory copyright under section 9 of the statute until there has been a divestment of the common law right of authorized first publication. Despite the consequence of the loss of the common law rights, it has ^{been} held that "the unrestricted offer of even a single copy to the public implies the surrender of the common law right" (*Werck Meister v. Am. Lithographic Co.*, 134 Fed. 321). A fortiori, the unrestricted offer of even a single copy of a work should suffice for an investitive publication.

The courts will more readily find an investitive

February 23rd, 1938

publication, one creating statutory copyright, than a divestitive publication, one abandoning so called common law copyright. (DeWolf on an Outline of Copyright Law, p. 32)

We have labored the point of publication. However, whether we be right or wrong, on that point, we respectfully submit that it is not for the Register of Copyrights to definitively decide the matter. We submit the Register is without authority to pass upon the question of whether copyright has been secured in and to a work.

The Register is authorized by statute to make rules and regulations in respect of registration (17 U. S. C. A. 53). Such rules, however, cannot go beyond registration (Patterson case, supra.) Registration, however, presupposes that which is registerable, namely, claim to copyright. It is only "after copyright has been secured by publication of the work with notice of copyright as provided in section 9" (17 U. S. C. A. 12) that deposit and claim of copyright (application for registration) are to be made. The Register's duties find their inception only after section 9 has been complied with (or attempted compliance therewith - but on this point it is for the courts and not the Register to decide).

Section 10 of the statute makes it mandatory, we submit, for the Register to issue to the copyright claimant, upon compliance with section 12 as to deposit and claim, "the certificate provided for in Section 55 of this title" (17 U. S. C. A. 10)

C. L. Bouve, Esq.

-7-

February 23rd, 1938

The Register has neither the power nor the machinery for the investigation of the validity of claims to copyright. (Eggers v. Sun Sales, 263 Fed. 373; Davies v. Bowes, 219 Fed. 178; Sheldon v. Metro-Goldwyn Pictures Corp.; 7 Fed. Supp. 837 - reversed on other grounds)

As it is said in the Eggers case, supra, p. 374:

"In form statutory copyright is effected by the act of the person claiming the privilege. What is registered is a claim of copyright. There is no provision for examination as in the case of patents*****" (Underscoring mine)

In the Sheldon case, supra, it is said at p. 843:

*****but the securing of a copyright is a purely mechanical matter*****" (Underscoring mine)

Were it otherwise, if the Register had the right and power to pass upon the validity of a copyright in respect of which registration is sought, it would be more than a mere "claim ^{copy} of right" that would be registerable.

Weil, supra, section 1622, states the following:

"The copyright office is not given the right to examine into the correctness of the statements contained in the application."

Respectfully submitted,

MANHEIM ROSENZWEIG

By

Alfred H. Wasserstrom

AHW:MF
Enclosure

R.D.M.

Received Feb 24, 1938

CABLE ADDRESS: KINGSYN NEW YORK

235 EAST 45TH ST.
NEW YORK CITY

EXHIBIT "A1"



KING FEATURES SYNDICATE INC.

ALL COMMUNICATIONS MUST BE
ADDRESSED TO KING FEATURES SYNDICATE

October 6th, 1938

Mr. John J. Burns,
76 Ridge Street,
Glens Falls, New York

Dear Sirs:-

In confirmation of our understanding with respect to the purchase by you of certain volumes as herein provided, we agree as follows:

The undersigned hereby sells to you and you hereby purchase two (2) copies of each of the following works:

1. King Features Illustrated Weekly
Volumes 1, 2, 3, 4, and 5.
2. King Features Weekly

You hereby agree to pay for the said volumes the price of twenty-five (\$.25) cents per volume, which sum shall become due and payable on the 1st day of the second month immediately following the month of shipment hereunder.

Each of the said volumes is sold to you hereunder without any restriction or limitation whatsoever upon your title in and to the said copies of the volumes.

It is our understanding that, though not a condition hereof, you will, immediately upon receipt of the volumes and for a reasonable time thereafter, exhibit, expose, and offer each of the volumes for sale at retail, so that any member of the general reading public desiring to purchase any or all of the said volumes may be able to do so.

Mr. John J. Burns

- 2 -

October 6th, 1938

The undersigned agrees, subject to full performance on your part of the terms hereof, to permit you to return for full credit against the said purchase price, such copies of the said volumes as you have been unable to resell at retail, provided such unsold copies or the covers thereof are returned to the undersigned on or before the date of payment hereunder.

The aforesaid volumes will be mailed to you this day under separate cover.

Your acceptance indicated upon the copy hereof will constitute this our contract of sale.

Kindly return the copy with your acceptance noted thereon to the undersigned in the self-addressed envelope enclosed herewith.

Very truly yours,

KING FEATURES SYNDICATE, INC.

By *Barney Grey*

ACCEPTED

Vice President

John J. Burns
By William Concoran

EXHIBIT "B1"

ADDRESS: KINGSYN NEW YORK
235 EAST 45TH ST.
NEW YORK CITY



ALL COMMUNICATIONS MUST BE
ADDRESSED TO KING FEATURES SYNDICATE

DATE October 7, 1938

The undersigned hereby acknowledges receipt, this day of
copies of volumes referred to in letter dated October 6th, 1938,
and further states that the said copies have been publicly exhibited
and exposed and offered for resale this day.

Signed:

John J. Burns

Mr. John J. Burns

By William Corcoran

X 5/12

Ref 491
6-7-40
RWT

May 2nd, 1935

Dear Mr. Brown:

I am enclosing form A7 and two copies of
"Hide the Body" by Grace Sertwell Mason for
copyrighting.

Please send certificate of registration to:

Miss Dorothy Taylor,
c/o International Magazine Company, Inc.,
959 Eighth Avenue,
New York City.

Charge fee to the trust fund account of the
International Magazine Company, Inc. (H. I.-
Cosmopolitan)

Sincerely,

William L. Brown, Esq.,
Register of Copyrights,
Library of Congress,
Washington, D. C.

CDL:TMM

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
WASHINGTON

May 7, 1935

Dear Sirs:

We received May 3 the two copies, application, and fee submitted by you for registration of the book entitled "Hide the Body" by Grace Sartwell Mason.

The copies are typewritten. The question therefore arises whether publication has actually taken place, and if so, whether these are "copies of the best edition then published" as required by law.

Publication, of course, means issuing to the public. It hardly seems probable that a work of this character would be actually published in typewritten form, when only a very limited number of copies would normally be produced on the typewriter. Books which are intended for publication are almost always printed in quantities to meet the public demand. Such publication rarely, if ever, takes place in the form of typewritten copies for reasons that are obvious.

The Copyright Office therefore feels obliged to question any application for registration of a book which is accompanied by deposit of typewritten copies. If you wish to submit some statement which you think would justify the claim that publication has taken place, it will be duly considered, but it might be preferable to remove the difficulties by having the material printed on the printing press, or at least multigraphed or mimeographed, and deposit copies in permanent form. The typewritten copies may then be returned.

Awaiting further explanation, your material is being held under "TRUST", but can be returned in due course.

Enclosures:

Form A-1, Circ. 16

International Magazine Co.,
959 Eighth Ave.,
New York, N. Y.

Respectfully,

Wm L. Brown
Register of Copyrights

OFFICE OF THE
REGISTER OF COPYRIGHTS
SL:JD

LIBRARY OF CONGRESS
COPYRIGHT OFFICE
WASHINGTON

✓
Reffo Ex Z. Id
6-7-40
RWT

Edut
MAY 29 1935

May 28, 1935

Gentlemen:

Referring to your application for registration of the work entitled "Hide the Body", the entry has been duly made upon deposit of the printed copies and the certificate of registration if not already received will reach you in due course.

As no use can be made of them in this Office we return under separate cover the two typewritten copies of this work originally received in this Office on May 3, 1935.

Enclosures;
2 copies (sep. cov.)

Respectfully,

W. L. Brown
Register of Copyrights
W.

International Magazine Co, Inc.
(H. I. Cosmopolitan)
959 Eighth Avenue
New York, New York

International Magazine Company, Inc.
New York, N. Y.

Title of book: Hide the Body.
By Grace Lantwell Mason.

Ref. X.C.C. 9d

6-7-40 SWB

Author, of the United States.

Date of publication Apr. 29, 1935. Affidavit received May 21, 1935.

Copies received May 21, 1935. Entry: Class AA, No. 195174

[SEAL]

Wm Brown

Register of Copyrights

7-
LIBRARY OF CONGRESS
COPYRIGHT OFFICE

WASHINGTON, D. C.

No. 42A*

*Reffo E.A.A. Id
6-7-40 RWT*


DEAR SIR:

You have deposited in this Office, in accordance with the requirements of the copyright law, two copies of the work inclosed, together with the required application and the statutory fee. Registration has been duly made and the required certificate or certificates have been mailed as requested. The two copies of the work received have been duly stamped to show the date of receipt, and the entry class and registration number; and receipt of the required copies has been duly recorded.

As these copies are not further required in this Office or in the Library of Congress, they are herewith returned to you under the provisions of sections 59 and 60 of the Copyright Act of March 4, 1909, which permit the return to the copyright claimant of articles deposited. These copies, as noted, bear markings to show that they are the copies which were deposited for copyright as the law required, and you may therefore preserve them with your certificate. It should be understood that any copies which are not now returned have been taken over by the Library of Congress for use therein under section 59 of the Copyright Act of March 4, 1909, and are therefore not returnable.

Respectfully,

Wm. L. Brown
Register of Copyrights.

 Save these copies to prove your copyright.

Circular Letter No. 42A*
Registered copies returned
July, 1934-20,000

RG 0060 Department of Justice

Civil Division; Criminal Division/

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